FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, *Petitioner,*

v.

SIOUX NATION OF INDIANS, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court of Claims

BRIEF FOR THE SIOUX NATION

ARTHUR LAZARUS, JR., ESQUIRE
Fried, Frank, Harris, Shriver
& Kampelman
600 New Hampshire Avenue, N.W.
Suite 1000
Washington, D.C. 20037
(202) 342-3624

Of Counsel:

MARVIN J. SONOSKY, ESQUIRE
REID P. CHAMBERS, ESQUIRE
HARRY R. SACHSE, ESQUIRE
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

WILLIAM HOWARD PAYNE, ESQUIRE
1086 National Press Building
14th & F Streets, N.W.
Washington, D.C. 20045

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-639

United States of America, *Petitioner,*

v.

Sioux Nation of Indians, et al., *Respondents.*

BRIEF FOR THE SIOUX NATION

OPINIONS BELOW

The final opinion of the Court of Claims (Pet. App. 1a-70a) is reported at 601 F.2d 1157 (1979). The opinion of the Indian Claims Commission (A. 264-315), which the court below affirmed, is reported at 33 Ind. Cl. Comm. 151 (1974). An important earlier opinion of the Court of Claims in this litigation (A. 257-63d) is reported at 207 Ct. Cl. 234, 518 F.2d 1298 (1975).

QUESTIONS PRESENTED

1. Whether the United States, under circumstances constituting a legislative taking of private property, need not pay just compensation under the Fifth

Amendment to an Indian tribal owner of treaty-protected land on the same basis as a non-Indian landowner.

2. Whether the Court of Claims, in applying a "good faith effort" test for finding a Fifth Amendment taking in Indian cases, correctly determined that Congress did not make a good faith effort to pay the Sioux for the Black Hills.

3. Whether the United States is excused from its constitutional obligation to pay the Sioux just compensation for a taking of their property if Congress, in the 1877 Act which effected the taking, intended to promote their welfare.

TREATIES AND STATUTES INVOLVED

Articles 2 and 12 of the Treaty of April 29, 1868, 15 Stat. 635, set forth in full at pages 317-28 of the Appendix, provide in material part:

> Art. 2. The United States agrees that the following district of country [Great Sioux Reservation] * * * shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named * * * ; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians * * *.
>
> Art. 12. No treaty for the cession of any portion or part of the reservation herein described

> which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same * * * .

The Act of August 15, 1876, 19 Stat. 176, from which an excerpt is printed at pages 329-30 of the Appendix, provides in material part:

> For this amount, for subsistance, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided,* That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number * * * .

Article 5 of the Act of February 28, 1877, 19 Stat. 254, set forth in full at pages 331-35 of the Appendix, provides in material part:

> In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians

in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one-half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. *Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick and infirm excepted;)* * * *.[1]

The Act of March 13, 1978, 92 Stat. 153 (P.L. 95-243), provides in its entirety:

> [S]ection 20(b) of the Act of August 13, 1946 (c. 959, 60 Stat. 1054), as amended, is hereby further amended by adding a new sentence at the end thereof, as follows: "Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall

[1] Petitioner omits the italicized portion of the 1877 Act, showing the limited and conditional nature of the Government's promise, from its reprint of the statutes involved. (Govt. Br. 3.)

> review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo.

STATEMENT

Petitioner's background statement represents an exercise in revisionist history—and thus is not acceptable to respondents. In brief, petitioner seeks to convert a course of governmental conduct towards the Sioux Nation during the period 1874-1877, which the court below characterized as probably the most "ripe and rank case of dishonorable dealings . . . [to] be found in our history" (A. 261), into the benign action of a concerned trustee. The record precludes such legerdemain.

The statement of the Sioux Nation, which follows, is taken directly from the findings of fact entered by the Indian Claims Commission in 1974 (A. 264-315) and from the 1979 opinion of affirmance by the Court of Claims (Pet. App. 1a-70a), the judgment which is before this Court for review. Petitioner largely ignores these findings of fact and refers in its statement primarily to unevaluated evidentiary materials[2] or to

[2] The Government is asking this Court to retry the background facts, contrary to the principles governing review of Court of

the findings entered in 1942 by the Court of Claims in *Sioux Tribe of Indians* v. *United States,* 97 Ct.Cl. 613 (A. 202-56). The special jurisdictional Act of March 13, 1978 (pp. 4-5, *supra*), however, expressly defines the terms under which this case is to be considered and provides that the Court of Claims shall decide the Sioux' Fifth Amendment claim "on the merits, without regard to the defense of res judicata or collateral estoppel," and, in reaching that decision, shall determine the issue of whether a taking occurred "de novo." Thus, for present purposes, the 1978 Act wiped the judicial slate clean,[3] and the Government's continued reliance upon the 1942 *Sioux* opinion is inappropriate and improper.

A. Historical Setting

1. *The Treaty of April 29, 1868:* Although the critical period in this case is 1874-1877, the events of those years must be viewed in the context of the previous relationship between the Sioux and the Govern-

Claims' judgments laid down in *United States* v. *Penn Foundry and Mfg. Co.,* 337 U.S. 198, 205 (1949); *Seminole Nation* v. *United States,* 316 U.S. 286, 300 (1942); and *Crocker* v. *United States,* 240 U.S. 74, 78 (1916).

[3] In 1975, the court below reversed the Commission's determination that the Act of February 28, 1977, *supra,* effected a taking of the Black Hills country on the ground that its 1942 dismissal of the Sioux claim, whether "rightly or wrongly" decided, was *res judicata* on the issue of a Fifth Amendment taking. (A. 257, 263.) Congress passed the Act of March 13, 1978, *supra,* for the specific purpose of overriding the *res judicata* effect of the 1942 *Sioux* decision and according the respondents a new hearing on the merits of their claim. H. REP. No. 95-529, 95th Cong., 2d Sess. (1978), reprinted in *1978 U.S. Code Congressional and Administrative News,* vol. 3, pp. 433 *et seq.* Petitioner's repeated reliance upon the 1942 opinion thus violates the express mandate of Congress.

ment. As the court below has observed (Pet. App. 5a), the factual background of the Black Hills claim begins with the Treaty of April 29, 1868, *supra,* into which the United States and the Sioux Nation entered after the Powder River War of 1866-1867 and passage of the Indian Peace Commission Act of July 20, 1867, 15 Stat. 17. By virtue of the 1868 Treaty, the United States acquired 48,142,000 acres of Sioux land in the present States of North Dakota, South Dakota, Montana, Wyoming and Nebraska, the bulk of which respondents had held under recognized title[4] pursuant to the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749. *See Sioux Tribe* v. *United States,* 205 Ct. Cl. 148, 500 F.2d 458 (1974).[5]

Under the 1868 Treaty, the United States made three major promises to the Sioux Nation. (Pet. App. 5a.) First, the United States agreed that the Great Sioux Reservation, consisting of all the present State of

[4] Recognized or treaty title is to be distinguished from unrecognized or original Indian title. (*See* pp. 40-41, *infra.*) In *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1954), while holding that aboriginal title is not protected by the Fifth Amendment, the Court reaffirmed that, "where the Congress by treaty or agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking." 348 U.S. at 277-78.

[5] In this separate, but related proceeding, the Indian Claims Commission has since determined that the United States paid the Sioux an unconscionable consideration for their property under the 1868 Treaty (about $45.5 million less than the fair market value)—a judgment on liability and value from which the Government has not appealed. *Sioux Tribe* v. *United States,* 42 Ind. Cl. Comm. 214, 232 (1978). The Sioux 1868 Treaty case currently is pending before the Trial Division of the Court of Claims on remand following the Government's successful appeal from the Commission's disallowance of offsets. *United States* v. *Sioux Tribe,* —— Ct. Cl. —— (Appeal No. 4-78, decided February 20, 1980).

South Dakota west of the Missouri River and including the Black Hills country here before the Court, was "set apart for the absolute and undisturbed use and occupation of the Indians herein named. . . ." (Art. 2.) Second, the United States agreed that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in" the Great Sioux Reservation. (*Ibid.*) Last, the United States agreed that no treaty for the cession of any portion of the Great Sioux Reservation "shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians. . . ." (Art. 12.)

As set forth below, in less than ten years the United States had broken each of these three key promises.[6]

2. *Invasion of the Great Sioux Reservation, 1874-1875:* At the time the 1868 Treaty was negotiated, the Sioux and some federal officials knew that gold was present in the Black Hills portion of the Great Sioux Reservation, but the Government had no confirmed

[6] Petitioner alleges that the 1868 Treaty "contemplated that the Sioux would become self-supporting on the reservation" and blames the Sioux for a "failure to achieve self-sufficiency" within four years. (Govt. Br. 7-8.) These statements are not based upon any finding of fact by the court below and are contrary to the record. The Sioux, for example, were self-sufficient before the United States acquired 48 million acres of their homeland under the 1868 Treaty. Moreover, contrary to the Government's thesis, the Sioux did not undertake any treaty commitment to shift from subsistence hunting to a farming economy in four years or any other fixed period of time. Indeed, under Articles 11, 15 and 16 of the 1868 Treaty, the Sioux expressly reserved their hunting rights outside the Great Sioux Reservation and, under Article 10, the United States agreed to pay $10 per person per year for up to 30 years to the Sioux "while such persons roam and hunt." (A. 323-25.)

data that gold existed there in sufficient quantities to be valuable. (Pet. App. 6a; A. 308.) Confirmed knowledge of gold deposits could be expected to invite an invasion of the reservation by miners, since the California gold rush was then recent history. Nevertheless, and without the consent of the Indians, the Secretary of War in May 1874 directed Lt. Colonel George A. Custer to undertake a reconnaissance mission through the Black Hills country, in part to report upon its mineralization. The Custer expedition that summer discovered gold in paying quantities and widely circulated the news in late August 1874. (Pet. App. 6a; A. 309-10.) Soon thereafter, a predictably large number of prospectors, miners and settlers swarmed into the Black Hills, again without the consent of the Sioux, and public demand for acquisition of that territory quickly developed and increased. (*Ibid;* A. 258.)

As required under Article 2 of the 1868 Treaty, federal military forces in the area initially attempted to exclude and remove these unauthorized persons from the Black Hills, but their endeavors, whether because of inability or unwillingness to keep the miners out, were largely unsuccessful. (Pet. App. 6a; A. 311.) Their efforts were also short-lived.[7] Having stimulated

[7] Petitioner claims that the United States made a serious effort to exclude miners from the Black Hills. (Govt. Br. 9-14.) The court below did not so find and the record does not so demonstrate. The facts are that the miners began invading the Black Hills in force during the fall of 1874, that mining operations were largely suspended during the winter, and that the Commissioner of Indian Affairs by early spring of 1875 already was calling for a cession of the Black Hills by the Sioux because of the alleged impossibility of keeping the miners out. Actually, as early as March 16, 1875, and thus long before the difficulty of excluding miners from the Great Sioux Reservation had become evident, the Adjutant-General,

an unlawful invasion of the Great Sioux Reservation by making known its value for gold, the Government promptly responded to the miners' demands by beginning to pressure the Sioux for a land cession. (A. 310.)

In May 1875, the Secretary of the Interior brought a delegation of Sioux chiefs to Washington to hear preliminary proposals concerning the purchase of the Black Hills by the United States and the extinguishment of the off-reservation hunting rights possessed by the Sioux under Articles 11, 15 and 16 of the 1868 Treaty. (A. 311.) On June 3, 1875, President Grant met with the delegation.[8] Concerning the Black Hills, he warned the Sioux that "there will be trouble in keeping white people from going there for gold" and "it is possible that strong efforts might not be made to keep them out." (Pet. App. 16a; A. 311.) The Sioux delegation then was returned home to await arrival of the Government's treaty representatives.

In September 1875, the Allison Commission, appointed by the Secretary of the Interior upon instructions from President Grant to negotiate with the Sioux for the cession of the Black Hills and the surrender of hunting rights, met with the Indians on the

at the request of the President, instructed General Sherman to publicize the fact that "[e]fforts are now being made to arrange for the extinguishment of the Indian title" to the Black Hills country. (A. 79-80.)

[8] About the same time, on instructions from President Grant, Walter P. Jenney, a mining engineer, began conducting a topographical and geological survey of a portion of the Black Hills. (*See* p. 67, n.48, *infra*.) Jenney ultimately reported that this area contained excellent timber, agricultural and grazing lands as well as gold, but he did not attempt even to approximate its worth. (A. 310-11; *see* Govt. Br. 16.)

Great Sioux Reservation in grand council. (Pet. App. 16a; A. 312.) The Commission urged the Sioux to sell the Black Hills

> because 1—they were unable to support themselves and ought to bow to the wishes of the Government which fed them, 2—the Army was unable to keep settlers out of the hills and armed conflict between whites and Indians was inevitable, and 3—gold was useless to the Sioux.

(*Ibid.*) The Sioux spokesmen, realizing the great value of the Black Hills to the United States, offered to sell the gold country for $70 million, plus additional compensation for the gold already mined. The Allison Commission offered $6 million or, alternatively, $400,000 a year for the right to mine, grow livestock and cultivate the soil in the Black Hills, plus $500,000 paid over ten years for the surrender of the Indians' off-reservation hunting rights. (Pet. App. 16a-17a; A. 312.) No agreement was reached.

In describing the 1875 negotiations, petitioner repeatedly asserts that the Grant Administration there sought to offer the Sioux "a fair and full equivalent" for the Black Hills. (Govt. Br. 15-23.) The court below, however, found to the contrary. Looking through the self-serving justifications for their conduct by the federal officials involved, the Court of Claims pointed out:

> In its report on the unratified 1876 agreement that Congress adopted in the 1877 statute, the 1876 Commission stated that the Allison Commission had failed to obtain an agreement "because they had no authority to offer them [the Indians] any sum which would be a just equivalent for their right in the Black Hills, or which gave to the In-

dians hopes for the future." S. EXEC. DOC. No. 9, 44th Cong., 2d Sess. 12 (1876).

(Pet. App. 17a.) Moreover, the Jenney report (p. 10, n.8, *supra*), upon which petitioner heavily relies to show that the Government's representatives understood what a "fair equivalent" might be (Govt. Br. 15-17), actually made no mention of the value of the Black Hills and, moreover, was not even issued until November 1875, or, in other words, after the Sioux negotiations had terminated.

Following the Allison Commission's failure to obtain a cession of the Black Hills, the Grant Administration applied a new form of duress against the Sioux. (Pet. App. 17a.) In November 1875, the President, with the concurrence of the Secretary of War and the Secretary of the Interior, decided that, although the law still prohibited non-Indians from entering the Great Sioux Reservation, the Army would be ordered to cease opposition to their activities and would be removed from the area.[9] (Pet. App. 6a; A. 258, 312.) This major policy change was communicated to the military on a confidential basis (A. 59-60), but was otherwise kept secret to forestall opposition from those members of Congress and interested citizens who supported a peaceful solution to the issue. Of course, the

[9] The Court of Claims stated that "[t]he Government apparently believed that the Sioux's needs for the rations the government had been supplying them would prevent the Indians from making trouble." (Pet. App. 6a-7a.) Petitioner's contention that "there is no evidence" in support of this statement (Govt. Br. 14, n.11) is not well-taken. The court below plainly relied upon the observation of General Sherman, in a letter dated November 20, 1875, to General Sheridan, that "I think the Sioux Indians are all now so dependent on their rations, that they will have to do whatever they are required to do." (A. 60.)

miners noted the evacuation of the troops and, as the Army withdrew, promptly flocked into the Black Hills in ever-increasing numbers. (A. 312.)

3. *Government Use of Food as a Weapon, 1875-1877:* In November 1875, the Grant Administration also began to pressure Congress for unilateral action to acquire the Black Hills. (A. 312.) In his 1875 annual report, Commissioner of Indian Affairs Edward Smith noted that the Sioux were unable to support themselves and were receiving about $1,250,000 in rations annually, which the United States was under no legal obligation to provide. He stated that the failure to receive these rations would reduce the Sioux to a state of starvation and expressed the view that the Government was entitled to ask something of the Sioux in return for food. (A. 312-13.) Unlike petitioner's statement in this case, the Commissioner of Indian Affairs in 1875 candidly conceded that the Sioux were being "compelled to surrender" the Black Hills "for the sake of promoting the mining and agricultural interests of white men. . . ." (A. 152.)

The 1875 annual report of the Secretary of the Interior expressed a similar view. Specifically, the Secretary wrote that for the past two years Congress had been appropriating $1,260,000 for sustenance of the Sioux, that this amount was a gratuity for which the Government received nothing, and that without receipt of rations the Sioux would starve. The Secretary concluded that the Government would be justified in making receipt of further supplies contingent on Sioux relinquishment of the Black Hills gold fields and right-of-ways to the fields through the Great Sioux Reservation. (Pet. App. 17a-18a; A. 313.)

As the Indian Claims Commission expressly found, the Grant Administration, without waiting for action by Congress, precipitated relations with the Sioux into a crisis. (A. 313.) Using as a pretext some raids by a small number of non-reservation Sioux against whites and Indians of other tribes in the "unceded Indian territory" established for respondents pursuant to Article 16 of the 1868 Treaty,[10] the Secretary of the Interior, on December 3, 1875, instructed the Commissioner of Indian Affairs to direct federal officers at all agencies in Dakota and at Fort Peck, Montana to notify the Sioux in the Yellowstone and Powder River areas "that unless they shall remove within the bounds of their reservation (and remain there) before the 31st of January next, they shall be deemed hostile, and treated accordingly by the military force." (A. 313.)

The bulk of the Sioux within the unceded Indian territory during the winter of 1875-1876 were peacefully hunting with the permission of their agents, as they had a right to do under Article 16 of the 1868

[10] Article 16 of the 1868 Treaty provides in material part:

> The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same. . . .

The "unceded Indian territory" consisted of about 25 million acres (Govt. Ex. V-1 (map)), lay immediately west and south of the Great Sioux Reservation and contained the best Sioux hunting grounds in the valley of the Powder River. That some Sioux were hostile to unauthorized white persons there is hardly surprising. (*See* A. 109-12.) In addition to a constant stream of illegal emigrants through the Article 16 country, settlers unlawfully occupied a portion of the Sioux hunting territory in Nebraska with the assistance of the General Land Office as early as 1873. (A. 7-9.)

Treaty. (Pet. App. 7a; A. 313.) The severity of the winter made it physically impossible for the Sioux to comply with the Secretary's instructions. Indeed, the weather was so harsh that the Secretary's own messenger could not return to the reservation by the deadline. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that his order had not been followed and that the Sioux were being turned over to the Army for appropriate military action. (*Ibid*; A. 258.)

In military operations against Indian tribes, the Army generally destroyed the Indians' homes, food supplies and other resources, and the so-called "hostiles"—men, women and children—were to be shot on sight. The Army commenced such a war of attrition against the Sioux in the spring of 1876. The climax of that campaign was the famous defeat of General Custer at the Little Big Horn on June 25, 1876. (Pet. App. 7a; A. 314.)

Congress responded by approving a rider to the Indian Appropriations Act of August 15, 1876, 19 Stat. 176, 192, which cut off all rations for any band of Sioux "while said band is engaged in hostilities against the white people,"[11] and which further provided that "hereafter there shall be no appropriation made for the subsistence of said Indians" unless the Sioux first agreed to sell the Black Hills, to relinquish their off-reservation hunting rights and to grant three right-of-ways through the Great Sioux Reservation. (Pet. App. 7a, 19a.) As the Indian Claims Commission also

[11] This cut-off of appropriations applied not only to gratuities, but also to the payments still due the Sioux under Articles 7, 8 and 10 of the 1868 Treaty.

specifically found in these proceedings, "this provision meant that unless the Sioux ceded the Black Hills to the United States, and surrendered their right to hunt off the reservation, the United States would allow them all to starve." (A. 314; *see* A. 258.)

Following passage of the 1876 Act, the President appointed another commission ("Manypenny Commission") to negotiate with the Sioux. During the autumn of 1876, the Manypenny Commission met with the Sioux at their agencies. (Pet. App. 8a; A. 315.) By this time, the bulk of the Sioux had been disarmed, dismounted and confined within the Great Sioux Reservation, and made wholly dependent upon the United States for their subsistence. (Pet. App. 20a; *see* Govt. Br. 40.) In its meetings with the Sioux, the Manypenny Commission "submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular." (A. 103.) The Indians were left with no doubt that, if they refused to cede the Black Hills, they would receive no further rations and that the alternative to capitulation to the Government's demands would be starvation. (Pet. App. 20a.)

Notwithstanding the helpless condition in which the Government had placed the Sioux and the ultimatum contained in the 1876 Appropriations Act, less than 10% of the male adult Sioux assented to the Black Hills cession agreement proposed by the Manypenny Commission. (Pet. App. 8a; A. 315.) The agreement, therefore, did not satisfy the requirement in Article 12 of the 1868 Treaty that no cession of land within the Great Sioux Reservation would be valid without the written approval of three-fourths of the adult male

Sioux. (A. 258.) The Manypenny Commission, though, submitted the purported agreement to the President, who in turn submitted it to Congress. (Pet. App. 8a-9a; A. 315.) Congress then "resolved the impasse by enacting into law the unratified agreement" pursuant to the Act of February 28, 1877, 19 Stat. 254. (A. 258; *see also* Pet. App. 9a; A. 315.) This is the chain of events which led the Court of Claims to conclude (A. 261):

> The duplicity of President Grant's course and the duress practiced on the starving Sioux, speak for themselves. A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history * * *.

4. *Provisions of the 1877 Act:* Under the Act of February 28, 1877, *supra,* Congress redefined the boundaries of the Great Sioux Reservation to exclude—and the United States thus acquired clear title to—the Sioux Black Hills country, a tract containing 7,345,157 acres of valuable timber, agricultural and grazing land and the richest gold mines in the world (including, in particular, the Homestake Mine, the foundation of the George Hearst fortune). *See* 33 Ind. Cl. Comm. 151 (1974) at 157, 234-35, 266, 309-12. Under the 1877 Act, Congress also "abrogated" Article 16 of the 1868 Treaty, mandated the cession of Sioux hunting rights under Article 11 of the 1868 Treaty [12]

[12] Under Article 11 of the 1868 Treaty, the Sioux agreed "that they will relinquish all right to occupy permanently the territory outside" the Great Sioux Reservation, "but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase." The Article 11 country amounted to about 25 million acres (Govt. Ex. V-1 (map)), so that, together with the "unceded Indian territory"

and took three right-of-ways through the Great Sioux Reservation from the Missouri River to the Black Hills country. (19 Stat. 255; A. 332.) Approximately 900,000 acres on the north side of the Great Sioux Reservation, which the United States had obtained from the Sioux in 1868, were restored to the reservation.

The 1877 Act recited that, "[i]n consideration of the foregoing cession of territory and rights," the United States would furnish the Sioux "schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868," would give "all necessary aid to assist the said Indians in the work of civilization" and also would "provide the said Indians with subsistence consisting of a ration for each individual. . . ." (19 Stat. 256; A. 333.) Congress further stipulated, however, that "[s]uch rations, or so much thereof as may be necessary," would continue to be distributed only "until the Indians are able to support themselves," and subject to three additional limiting conditions:

> (1) rations would be issued only "upon full compliance with each and every obligation" imposed upon the Sioux by the 1877 Act;
>
> (2) "whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school"; and

established under Article 16 (*see* p. 14, n.10, *supra*), the Sioux possessed rights in over 50 million acres of land outside their permanent reservation.

> (3) "[w]henever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick and infirm excepted;)".

(*Ibid.*) As the court below concluded, "[i]n return for obtaining the Black Hills, the government did not even unqualifiedly undertake to provide all the Sioux with food." (Pet. App. 26a.)

B. Background Of This Litigation

1. *Early History:* For many years after 1877, Federal law prohibited the Sioux from presenting the Black Hills claim for judicial review. The doors of the courts originally were closed to respondents (as well as to other Indian tribes) because the 1863 statute which granted authority to the Court of Claims to render judgments against the United States specifically excepted from that court's jurisdiction "any claim against the government . . . dependent on any treaty entered into . . . with Indian tribes." (*See* Govt. Br. 47 at n.38.) When Congress enlarged the jurisdiction of the Court of Claims in 1887, the same ban against Indian tribal claims unfortunately was carried forward.[13]

Given the rule that, for Indian tribes, no suit could be filed unless Congress passed a special statute waiving sovereign immunity and granting jurisdiction to the courts, the Sioux' only hope for a hearing on the Black Hills claim lay in petitioning Congress for redress. After years of such importuning, Congress in

[13] Act of March 3, 1863, 12 Stat. 744; section 1 of the Tucker Act of March 3, 1887, 24 Stat. 509, codified in 28 U.S.C. 1491.

1920 finally passed a special statute giving respondents permission to sue the United States in the Court of Claims.[14] One case, filed by the Sioux on May 7, 1923, involved the acquisition of the Black Hills under the Act of February 28, 1877, *supra*. The court, however, dismissed the suit in 1942 on the ground that the Black Hills claim fell outside the jurisdiction conferred by the 1920 Act. *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613 (1942), *cert. denied* 318 U.S. 789 (1943).

2. *Initial Proceedings Below:* In 1946, Congress created the Indian Claims Commission,[15] a new forum to hear and determine all tribal grievances which previously had arisen, and on August 15, 1950, former Sioux counsel resubmitted the Black Hills claim. Four years later, in an early opinion, the Commission entered a final judgment dismissing the suit on the ground that the Sioux had failed to prove their case.[16] *Sioux Tribe* v. *United States,* 2 Ind. Cl. Comm. 646 (1954). On appeal, the Court of Claims affirmed the dismissal. *Sioux Tribe of Indians* v. *United States,* 146 F. Supp. 229 (Ct. Cl. 1956). At this point, respondents belatedly retained new counsel.

The Sioux thereafter filed with the Court of Claims a motion to vacate the judgment of affirmance, alleging, *inter alia,* that the Commission's decision had

[14] Act of June 3, 1920, 41 Stat. 738.

[15] Act of August 13, 1946, 60 Stat. 1049, codified as 25 U.S.C. 70 *et seq.*

[16] The Commission disposed of this large and complex litigation after a hearing which lasted two hours and 20 minutes. 205 Ct. Cl. at 182, 500 F.2d at 476. At that so-called trial on the merits, prior Sioux counsel placed in the record a total of seven exhibits—the same material introduced in evidence in the earlier case dismissed by the Court of Claims in 1942.

been reached on the basis of an incomplete record due to inadequate representation by former Sioux counsel and that respondents' rights should not be prejudiced by his erroneous factual concessions. The court below granted the Sioux motion, vacated its judgment and directed the Commission to determine:[17]

> (1) whether the claimant Indian tribes are entitled on the basis of the statements made in support of the above motions to have the proof in this case reopened, and (2) if so, to receive additional proof sought to be offered and on the basis thereof, together with the record already made, reconsider its prior decision in this matter.

On November 19, 1958, only two weeks after the remand, the Commission, which had direct knowledge of the earlier proceedings and the quality of prior Sioux representation, entered an order reopening the proof in the case and also announced that it would reconsider its previous holding. (A. 265-66.)

3. *Commission Decision on the Merits:* On November 4, 1960, the Sioux filed an amended petition covering the Black Hills claim, which reiterated the allegation that the Act of February 28, 1877, *supra,* constituted a taking of Sioux land and rights for which just compensation was payable under the Fifth Amendment. Instead of responding to the amended petition within 60 days, as required under Commission Rules 11 and 13, 25 CFR §§ 503.11 and 503.13, the Government postponed the actual filing of its answer until June 28,

[17] *Sioux Tribe of Indians* v. *United States,* App. No. 4-55 (Ct. Cl., Order of November 5, 1958); for a summary of action by the Court of Claims relative to the first appeal in this case, *see* 182 Ct. Cl. 912-13 (1968); *see also Sioux Tribe* v. *United States,* 205 Ct. Cl. 148, 182, 500 F.2d 458, 476 (1974).

1966, almost six years after the Sioux had been granted leave to file their amended pleading. During that six-year interval, the United States, on January 19, 1961, first filed a petition with the Court of Claims for a writ of mandamus seeking to upset the Commission's actions upon remand; the petition was denied on February 6, 1961. 182 Ct. Cl. 912-13 (1968). Next, the United States, on June 16, 1961, moved to dismiss the Black Hills claim, a request which the Commission denied on January 30, 1962. Lastly, after four years of silence and consequent delinquency in filing its answer, the United States on March 23, 1966, moved for a clarification of the record, which "clarification" the Commission furnished on May 25, 1966.[18] A month later, the answer to the amended petition finally was forthcoming.

Thereafter, the pace of the litigation before the Commission somewhat quickened. At respondents' request, the Commission on October 29, 1968, set down the following three questions for briefing and determination:

> 1. What land and rights did the United States acquire from the Sioux by the Act of February 28, 1877, C.72, 19 Stat. 254, 1 Kappler 168, and what were the exterior limits (a) of the land so acquired and (b) of the area subject to the rights so acquired?
>
> 2. Was there any consideration for defendant's acquisition of land and rights under the 1877 Act and, if so, what constituted such consideration?

[18] At respondents' suggestion, the Commission on May 25, 1966, entered an order formally splitting the *Sioux* case into Docket No. 74 (1868 Treaty claim) and Docket No. 74-B (Black Hills claim). The full record in both cases is here before the Court.

> 3. If there was no consideration for defendant's acquisition of lands and rights under the 1877 Act, was there any payment for such acquisition?

(A. 266.) With respect to the first question, the Commission ruled in a series of decisions that the United States under the 1877 Act acquired from the Sioux the Black Hills portion of the Great Sioux Reservation, all rights retained by the Sioux under Articles 11 and 16 of the Treaty of April 29, 1868, *supra,*[19] and three right-of-ways through the Great Sioux Reservation.[20] 23 Ind. Cl. Comm. 358 (1970); 24 Ind. Cl. Comm. 98 (1970); 33 Ind. Cl. Comm. 151, 157-58, 229-31 (1974) (A. 269, 296-98). In these opinions, the Commission further defined the exterior boundaries of the Black Hills country, a tract of 7,345,157 acres (A. 269), and the areas subject to Sioux rights under Articles 11 and 16, which each consisted of approximately 25 million acres (*see* pp. 14 at n.10 and 17 at n.12, *supra*).

In addition to ordering the briefing of legal issues, the Commission conducted hearings in November 1969 and May 1970 for the purpose of receiving evidence

[19] The Commission further determined that, although such rights were "compensable interests," the Sioux could recover for their Article 11 and 16 rights only if they could prove that these rights had a greater value in 1877 than when respondents obtained them in 1868. 24 Ind. Cl. Comm. 98 (1970). The Sioux did not pursue this line of proof (A. 267), which counsel believed to be based upon an erroneous legal premise, so the Commission's ultimate award of $17.5 million does not include any compensation for the abrogation of respondents' rights under Articles 11 and 16 of the 1868 Treaty.

[20] For some 300 miles, the Missouri River flowed through the Great Sioux Reservation. Nonetheless, the Commission found that the United States did not acquire a compensable interest when Congress legislated Sioux consent "to the free navigation of the Missouri River" under Article 2 of the 1877 Act. (A. 298.)

and taking the testimony of expert witnesses on value, and, in December 1973, heard oral argument on the question of whether the Black Hills claim involved a taking in violation of the Fifth Amendment. Then, on February 15, 1974, the Commission rendered its principal decision—an opinion, detailed findings of fact and interlocutory order totalling 212 pages (33 Ind. Cl. Comm. 151 *et seq.*)—which held, *inter alia*:

(a) That the Black Hills land and minerals, especially gold, had a fair market value on February 28, 1877, of $17.1 million (33 Ind. Cl. Comm. at 362, 245-357 *passim*);[21]

(b) That the Act of February 28, 1877, *supra,* effected a taking of Sioux land and rights for which just compensation was due under the Fifth Amendment (A. 288-90);

(c) That the United States had waived the defense of *res judicata* and, even in the absence of waiver, the decision of the Court of Claims in *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613 (1942), did not represent an adjudication on the merits of the Sioux Fifth Amendment claim (A. 273-88);

(d) That $2,250,000 in gold had been removed from the Black Hills by trespassing miners prior to February 28, 1877, and that the gold so removed had a value in the ground of $450,000, for which the United States was liable (A. 292-96; 33 Ind. Cl. Comm. at 357-59);[22] and

[21] The Government does not here challenge the $17.1 million valuation (Govt. Br. 48), and did not challenge the valuation in the court below. (Pet. App. 2a.)

[22] The Government has not questioned this liability of $450,000 for minerals wrongfully removed either before this Court or in the Court of Claims (Govt. Br. 48; Pet. App. 2a), but did successfully challenge the allowance of interest on this sum in the court below. (Pet. App. 34a-38a.)

(e) That the United States was entitled to a credit for food, rations and provisions furnished to the Sioux pursuant to the 1877 Act in an amount to be determined in a subsequent proceeding. (A. 290-92, 299.)

The Government promptly filed an interlocutory appeal pursuant to the Act of September 8, 1960, 74 Stat. 829, 25 U.S.C. 70s(b), as amended.

4. *Appeal by the United States to the Court Below*: The Government's appeal to the Court of Claims from the Commission's interlocutory ruling was limited to the proposition that the Sioux' Fifth Amendment claim should have been barred by *res judicata,* including collateral estoppel, or, in the alternative, that the 1877 Act did not effect a taking of the Black Hills country for which just compensation is due. Over Judge Davis' dissent, and without reaching the merits, a majority of the court below held that its 1942 opinion in *Sioux Tribe of Indians* v. *United States, supra,* whether "rightly or wrongly" decided (A. 263), did give rise to a valid *res judicata* defense to respondents' claim for just compensation under the Fifth Amendment. *United States* v. *Sioux Nation,* 207 Ct. Cl. 234, 518 F.2d 1298 (1975). This Court denied certiorari. *Sioux Nation* v. *United States,* 423 U.S. 1016 (1975).

While the Government's appeal was pending, Congress approved the Act of October 27, 1974, 88 Stat. 1499. That act was primarily directed to the Sioux

Black Hills case and amended section 2 of the Indian Claims Commission Act to provide that, in the determination of offsets, "expenditures for food, rations, or provisions shall not be deemed payments on the claim." (25 U.S.C. § 70a, as amended.) As explained in the report of the Senate Committee on Interior and Insular Affairs:

> Although couched in general terms, this amendment is directed to one basic objective—expediting the Indian Claims Commission's disposition of the famous Black Hills case which has been under consideration in the courts without a final decision since 1923. * * *
>
> The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs.
>
> The amendment to S. 3007 is designed to correct this inequity by amending section 2 of the Indian Claims Commission Act to provide that "food, rations or provisions" shall not be deemed to be payments on a land claim. In the Black Hills case, such a change in the law also would eliminate the necessity for a prolonged and expensive GSA investigation into the amount of rations furnished under the 1877 Act, and thus would move this long-delayed claim a substantial way further towards a final decision. That result is in the interest of both the United States and the Sioux.

S. REP. No. 93-863, 93rd Cong., 2d Sess. (1974), reprinted in 1974 *U.S. Code Congressional and Administrative News,* vol. 3, pp. 6111, 6112, 6115. When so amending the Indian Claims Commission Act, Congress was well aware that its action might result in a judgment on the Black Hills claim "in the amount of approximately $100 million." (120 CONG. REC. H. 35643 (1974); *see* Pet. App. 38a.)

In light of the 1974 Act, the Court of Claims thought that the still-pending offset question in this litigation was largely resolved (A. 260), but remanded the case to the Commission for final disposition. (A. 263.)

5. *Final Commission Proceedings*: After the Court of Claims' remand in 1975, the Government advised the Commission that its claim pursuant to 25 U.S.C. § 70a for the allowance of gratuitous offsets in the Black Hills case (Docket No. 74-B), if any, would be reserved for presentation in the Sioux 1868 Treaty case (Docket No. 74), which still is pending. (*See* p. 7, n.5, *supra.*) In addition, the parties agreed that the three right-of-ways through the Great Sioux Reservation obtained by the United States under the Act of February 28, 1877, *supra,* had a fair market value of $3,484.[23] Finally, the Commission set down for trial the factual question—previously briefed with respect to legal issues pursuant to its order of October 29, 1968 (pp. 22-23, *supra*) and partially decided in 1974 (A. 290-92)—of what expenditures the United States actually had made for the benefit of the Sioux under

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[23] This agreement raised the principal amount of the Sioux award to $17,553,484—$17.1 million for the land, $450,000 for gold wrongfully removed by miners before the 1877 Act, and $3,484 for the three right-of-ways. (Pet. App. 2a.)

the 1877 Act. Thus, the Commission gave the Government a specific opportunity to demonstrate "the extent of defendant's payments on plaintiffs' claim . . ." for purposes of establishing possible legal offsets. (A. 316.)

Thereafter, on May 19, 1976, Commissioner Vance, to whom the matter had been assigned, issued his preliminary decision on this question, pursuant to Commission Rule 26, 25 C.F.R. § 503.26, as follows:

> 2. What payments have been made by defendant on plaintiffs' claims arising out of the Act of February 28, 1877?
>
> [Answer:] None.

(*Ibid.*) By successive orders of the Commission, the Government's time to except to Commissioner Vance's report was extended to November 15, 1976. On October 15, 1976, however, the Government advised the Commission that "defendant has decided not to press its setoff claims any further," and Commissioner Vance's report, therefore, became a final order of the Commission. 25 C.F.R. § 503.27. The Government never appealed from or otherwise challenged that ruling.

On October 15, 1976, the Government also moved the Commission to enter a final award in favor of respondents in the amount of $17,553,484. The Commission, though, concluded that "the entry of final judgment in this docket ought to be deferred" in view of the pendency of legislation dealing with the case, and on November 10, 1976, entered an order directing that defendant's motion be held in abeyance. There the matter rested at the time that Congress passed the Act of March 13, 1978. (For full text, *see* pp. 4-5, *supra.*)

6. *Review Pursuant to the 1978 Act*: The 1978 Sioux special jurisdictional act provided that, upon application by respondents, "the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly." The 1978 Act further provided that, "[i]n conducting such review, the court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo."

The Sioux timely filed an application for review. Neither party requested a hearing or offered additional evidence, so the case was submitted to the court below on the basis of the existing record. (Pet. App. 5a.)

The Court of Claims, sitting *en banc*,[24] affirmed the Indian Claims Commission's decision that the 1877 Act had effected a taking of the Sioux Black Hills country in violation of the Fifth Amendment. In so holding, the court below first referred to the well-settled rule that, "when the United States appropriates property interests of others, that constitutes a taking under the fifth amendment, for which the

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[24] Chief Judge Friedman, author of the opinion below, was joined by Senior Judge (and former Chief Judge) Cowen, Judge Davis and Judge Smith. Judge Nichols concurred; Judges Bennett and Kunzig dissented.

United States is obligated to pay just compensation." (Pet. App. 9a.) The court, however, then stated its own rule in Indian cases—which this Court never has sanctioned—that a legislative appropriation of tribal lands without payment of just compensation does not constitute a taking "[w]here Congress makes a good faith effort to give the Indians the full value of the land," citing *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States,* 182 Ct. Cl. 543, 553, 390 F.2d 686, 691 (1968). (*Id.* at 10a.)

Having established the latter "guideline" for its analysis, the Court of Claims next inquired into whether Congress actually had made a "good faith effort" to give the Sioux a full and fair equivalent for the Black Hills, and determined that it had not. In undertaking this inquiry, the court below carefully noted that the "subjective motive of the legislature" in taking action was not involved, but only the objective facts, "as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition." (Pet. App. 11a.) Based upon an exhaustive study of such legislative materials (*id.* at 12a-26a), the Court of Claims concluded that "[t]here is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they could support themselves, constituted the fair equivalent of the value of the lands the United States was acquiring from them." [25] (*Id.* at 26a.)

[25] Petitioner asserts incorrectly that the court below placed upon Congress "the burden of justifying its action" and a requirement

In arriving at its decision that Congress did not make a "good faith effort" to pay the Sioux just compensation for their property, the court below also pointed out that, "[i]n return for obtaining the Black Hills, the government did not even unqualifiedly undertake to provide all the Sioux with food." (Pet. App. 26a.) Petitioner's claim that the United States ultimately spent more for rations than the Black Hills were worth in 1877, which respondents dispute (*id.* at 9a), was dismissed as irrelevant. Again citing *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* the court below ruled that "the subsequent payment to those wards of amounts that in hindsight appear to equal or even exceed the fair value of the property does not make the initial acquisition any the less a fifth amendment taking." (Pet. App. 28a.)

Finally, the Court of Claims aptly distinguished *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), upon which the Government literally had based its entire argument. Specifically, the court noted that *Lone Wolf* involved the constitutional power of Congress to break treaties with Indian tribes, a well-recognized power which respondents do not challenge in this litigation. As the court below further observed, the Black Hills case involves the follow-on question of whether the United States must pay just compensation for tribal property acquired in violation of a treaty, and this

to state affirmatively that the Sioux received a fair equivalent for the Black Hills. (Govt. Br. 45.) A fair reading of the Court of Claims' opinion shows that it was conducting a balanced inquiry into whether Congress actually had made a "good faith effort" to pay respondents full value for their property and the absence of any such "effort" had to be expressed in the negative language about which the Government complains. (*Id.* at 46, n.37.)

issue the *Lone Wolf* court lacked jurisdiction to determine. (Pet. App. 28a-32a.) The Court of Claims then properly concluded that the Sioux Black Hills claim had to be resolved in accordance with the principles laid down in the post-*Lone Wolf* decisions where this Court repeatedly has declared that, if the United States takes Indian property for its own use or to give to others, it must pay just compensation. (*Id.* at 32a-33a.)

In accordance with the foregoing opinion, the Court of Claims on July 31, 1979, entered a final judgment for the Sioux Nation in the amount of $17,553,484, with interest at 5% from February 28, 1877, "as a measure of just compensation" upon the major portion of that sum.[26] (Pet. App. 71a-73a.) The United

[26] The amount of interest payable is large because the Black Hills case is old, but Congress never thought that the age of their claims should deprive aggrieved Indians of appropriate relief. In its report on the bill which became the Indian Claims Commission Act of 1946, the House Committee on Indian Affairs stated that "[t]here is substance, as well as eloquence, in the plea of a group of Indians from the State of Washington:

> "We are told that you * * * have said that our claims are too old. Who made them old; who delayed the settlement? We are your children; we are your wards; we can do nothing without your consent. We have been—we are now helpless unless you act. We cannot bring suit against you in your courts. If settlement with us has been delayed, it has been due to your own fault. It is not the fault of the poor, ignorant, helpless Indian. Will you take advantage of your own fault? Will you say, I delayed a long time settling with my children; now because I delayed so long I will not settle with them at all? An Indian does not so pay his debt. If he cannot pay it his children pay it. We cannot believe that you * * * meant to take advantage of the poor Indian, and refuse to pay him because of your own delay."

H. REP. No. 1466, 79th Cong., 2d Sess. 5 (1945). In response to the further argument that the recoveries by Indian tribes under the Claims Act might be "large," the House Committee responded:

States petitioned for a writ of certiorari on October 19, 1979, and the writ was granted by the Court on December 10, 1979. As in the court below, the Government does not here deny liability for the fair market value of the property it acquired, but does seek, despite its more than 100-year delay in payment of that principal amount, to avoid the payment of interest as a measure of just compensation under the Fifth Amendment.[27]

SUMMARY OF ARGUMENT

I

The land taken from the Sioux by the Act of February 28, 1877, was property within the meaning of the Fifth Amendment and the Sioux are entitled to the same measure of just compensation as any other landowner. The United States twice recognized Sioux title to the Black Hills country by treaty. Perhaps the most fundamental principle in all Indian law, a principle ignored by the Government here, is the distinction consistently drawn by this Court between recognized title to Indian lands and mere aboriginal title. Aboriginal

> If the Government could save some millions of dollars by refusing to pay its just debts to its Indian citizens and by continuing to refuse them access to the courts for the enforcement of obligations that the Federal Government freely assumed, it could save even more by denying its white citizens access to the Court of Claims. But nobody has yet suggested that the Government of the United States should balance its budget by defaulting on its outstanding obligations to its white citizens and denying them access to the courts. Why should we do this to our Indian citizenry? * * *

(*Id.* at 9.)

[27] The 1877 value of the Black Hills would be paid in 1980 dollars and thus, even with interest, would be less than the 1877 value of the property in 1877 dollars.

title may be extinguished by the United States without the payment of just compensation. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). Treaty-recognized title is "property within the meaning of the Fifth Amendment," *Shoshone Tribe* v. *United States,* 299 U.S. 476, 497 (1937), and cannot be taken without payment of just compensation.

This Court in *Shoshone Tribe* and numerous other decisions has applied precisely the same rules for determining whether a taking of tribal treaty-protected lands has occurred as were applied in non-Indian cases. Moreover, the Court in *United States* v. *Creek Nation,* 295 U.S. 103 (1935), specifically rejected the Government's argument that, because of the special relationship of the United States to Indian tribes, a different standard applies to takings of reservation lands.

The United States did not pay just compensation to the Sioux for the gold-rich Black Hills and petitioner, in effect, so concedes. The 1877 Act provided no payment. Under the 1877 Act, the Government merely made a conditional promise to furnish an indeterminate number of Sioux with a limited ration of beef, bacon and flour for an indeterminate number of years. Just compensation is not a conditional promise to pay, but rather requires an exact and full equivalent for the fair market value of the land.

The Government's contention that Congress in 1877, or this Court today, would consider a promise to provide food to be just compensation for the lands and rights taken from the Sioux Nation is demeaning to the United States. The Sioux needed food because the Government already had taken the bulk of their homeland and had encouraged destruction of the buffalo

herds upon which their livelihood depended. To argue under such circumstances that limited Government rations constituted payment in full for the Black Hills is unconscionable. As the Senate Committee on Interior and Insular Affairs observed in 1974, in legislating that these same rations could not be used as an offset:

> Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land that it took.

This Court's decision in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), does not support the Government's position. *Lone Wolf* upholds the power of Congress to take the Sioux lands without the consent of the Indians and in violation of the 1868 Sioux Treaty. Nothing in the opinion may properly be construed to relieve the United States of the constitutional obligation to pay just compensation when Congress did so. *Shoshone Tribe* and other cases, which establish that tribal recognized title is protected by the Fifth Amendment, all were decided after *Lone Wolf.* Indeed, in *Shoshone,* this Court specifically referred to *Lone Wolf* and held that the power to abrogate a treaty "does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, *without rendering, or assuming an obligation to render just compensation.*'" (299 U.S. at 498; emphasis supplied.) Moreover, *Lone Wolf* was based largely on the concept prevalent in 1903 that Congress' power over Indians is "a political one, not subject to be controlled by the judicial department of the government." 187

U.S. at 565. This Court, citing *Lone Wolf*, specifically rejected that proposition in *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73 (1977) at 84.

In sum, applying well-established principles, the Sioux Nation is entitled to just compensation for the land and rights taken by the United States under the 1877 Act.

II

The Court of Claims in 1968 developed, and in this case relied upon, a more restrictive test for determining whether a Fifth Amendment taking of tribal recognized title has occurred—a test which this Court never has reviewed. In the opinion of the court below, if Congress clearly failed to make a "good faith effort" to pay the Indians the fair value of the property taken, they are entitled to just compensation, but not otherwise. Even applying this restrictive test, the Court of Claims, sitting *en banc,* held that Congress did not in fact make a "good faith effort" to pay the Sioux a full and fair equivalent for the Black Hills and thus that the 1877 Act effected a taking.

In so ruling, the court below examined in detail the sordid story of the Grant Administration's conduct towards the Sioux during the critical period 1874-1877, a course of action which the court previously and correctly had characterized as probably the most "ripe and rank case of dishonorable dealings . . . [to] be found in our history." (A. 261.) The court further studied the legislative histories of both the 1877 Act and the predecessor 1876 Indian Appropriations Act, including "congressional committee reports, statements submitted to Congress by government officials,

reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition." (Pet. App. 11a.) Based upon a thorough analysis of these legislative materials, the Court of Claims rightly concluded that Congress never even discussed paying compensation for the Black Hills or considered whether its conditional promise of rations was a fair equivalent for the value of the Sioux lands and rights the United States was acquiring. The Government's argument that its conduct really benefited the Sioux is unsupported by the record and properly was rejected by the court below.

In prior decisions, the Court of Claims has found a "good faith effort" to pay fair value where Congress contemporaneously ordered an impartial appraisal of the lands taken. Here, however, Congress did not provide for an appraisal of the value of the Sioux land and rights in 1877. Indeed, the court below, looking beyond what Congress did to what Congress may have thought, still could find no indication of a "good faith effort" to pay the Sioux the 1877 value of their property.

III

The Government argues in this case for the first time in any court that the United States, because it is trustee for the Sioux, need not pay just compensation "if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." The United States also seeks the strongest presumption that any legislation by Congress was intended to promote the welfare of the Sioux, and argues that, if any rational basis for the legislation can be shown, just

compensation is not owed. This harsh standard should be rejected.

The Government's fiduciary duty to Indian tribes surely does not justify affording the tribes *less* protection for their treaty-recognized land than would be afforded other property owners. The consistent decisions of this Court from *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, in 1831 to the present have held the Government to "the most exacting fiduciary standards" in dealing with tribal property, *Seminole Nation* v. *United States,* 316 U.S. 286, 296 (1942), and to an "overriding duty to deal fairly with Indians," *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). At the very least, the decisions of this Court stand for the principle that the United States in carrying out its fiduciary duty to Indians must observe no lower standard in dealing with tribal trust property than is owed with respect to any other private property.

The Government's argument that the obligation of the United States to provide for the needs and welfare of the Sioux gives it a right to take Sioux property for less than fair value is inherently false. A trustee, particularly as here a self-dealing trustee, may be empowered to transmute the property of the beneficiary, but not for less than full value. Moreover, the United States is subject to both the limitations inhering in guardianship *and* pertinent constitutional restrictions. *United States* v. *Creek Nation,* 295 U.S. *supra* at 110. Where Congress pays Indians less than just compensation for their property, the pertinent provisions of the Fifth Amendment are applicable.

The Government improperly seeks to apply a "rational basis" standard to the promise of rations made by the United States under the 1877 Act. The rational basis test has been promulgated by the Court as a ground for determining whether Congress acted within its constitutional authority over Indian affairs. The validity of the 1877 legislation by which Congress took Sioux land and rights, however, is not here challenged. The rational basis test thus is wholly irrelevant to the issue before the Court: whether the United States, having exercised its constitutional power to acquire the Black Hills, is required to pay just compensation for the property taken.

Finally, the test for just compensation proposed by the Government would deny Indian tribes equal protection of the law. No valid reason exists why treaty-recognized tribal lands, property within the meaning of the Fifth Amendment, should receive less protection than any other property. This Court has rejected that proposition in both *Creek Nation* and *Shoshone Tribe.* To create such a distinction now would put at risk the lands of all present day American Indian tribes. Moreover, to sustain the Government's argument would mean that Congress can take Indian lands and other property rights without paying just compensation so long as it provides any arguable benefit for the tribe, regardless of the value of the property taken and the paucity of the payment. Indian recognized title then would become little more than a tenancy by sufferance terminable at the pleasure of Congress—a result expressly rejected by the Court on repeated occasions.

ARGUMENT

I. The Sioux Nation Is Entitled to Just Compensation Under the Constitution for the Taking of Its Treaty-Protected Lands and Rights on the Same Basis and to the Same Extent as Any Other Property Owner.

A. The Black Hills portion of the Great Sioux Reservation, to which respondents possessed recognized title, is property within the meaning of the Fifth Amendment.

Under the Treaty of September 17, 1851, 11 Stat. 749, the United States recognized the title of the Sioux Nation to a substantial tract of land lying west and south of the Missouri River, including the Black Hills country here before the Court. *Sioux Tribe* v. *United States,* 205 Ct. Cl. 148, 500 F.2d 458 (1974). Under Article 2 of the Treaty of April 29, 1868, *supra,* with various bands of the Sioux Nation, the United States reconfirmed that the Great Sioux Reservation, including the Black Hills country, was "set apart for the absolute and undisturbed use and occupation of the Indians herein named. . . ." The Government does not here dispute that respondents possessed treaty or recognized title to the lands and rights acquired by the United States under the Act of February 28, 1877, *supra.*

Perhaps the most fundamental principle in all Indian law is the distinction drawn by this Court between recognized title and aboriginal or original Indian title. Aboriginal title is an Indian right to use and occupancy, never formalized by treaty or statute, which is valid against third parties,[28] but which the United States may extinguish without payment of just compensation under the Fifth Amendment. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955); *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48 (1951). By contrast, Indian reservations set aside by treaty or statute, and thus held under recognized title, are vested interests protected even against the United States by the Fifth Amendment to the Constitution. *United States* v. *Klamath & Moadoc Tribes,* 304 U.S. 119, 123-24 (1938); *Shoshone Tribe* v. *United States,* 299 U.S. 476, 496-97 (1937); *United States* v. *Creek Nation,* 295 U.S. 103, 109-10 (1935). Indeed, while holding in *Tee-Hit-Ton Indians* v. *United States, supra,* that aboriginal title is non-compensable, the Court reaffirmed that "where the Congress by treaty or agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking." 348 U.S. at 277-78.

The Black Hills portion of the Great Sioux Reservation thus is property within the meaning of the Fifth Amendment and entitled to its protection.

B. Indian tribes are entitled to the same measure of just compensation for the taking of their property by the United States as any other landowner.

In every case where an Indian tribe has sued the United States for an eminent domain taking of recognized title lands, this Court has determined that the Indians are entitled to just compensation on the same basis and to the same extent as non-Indian claimants.[29] In the leading case of *Shoshone Tribe* v. *United States,*

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[28] *See United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, 347 (1941); *Johnson* v. *McIntosh,* 21 U.S. (8 Wheat.) 543 (1823).

[29] As early as 1890, the Court declared that just compensation under the Fifth Amendment must be paid where Congress authorized construction of a railroad through lands patented to an Indian tribe. *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U.S. 641 (1890). The Court specifically observed that "[t]he Consti-

supra, for example, Mr. Justice Cardozo, after pointing out that the tribe's treaty-protected reservation was "property within the meaning of the Fifth Amendment" (299 U.S. at 497), also declared for a unanimous Court that "the right of interest or a fair equivalent attaches itself automatically to the right to an award of damages" for a taking of a part of such property. (*Ibid.*) This proposition that Indian tribes, such as the Sioux, are entitled to interest or its equivalent in just compensation cases is settled law. *United States* v. *Klamath & Moadoc Tribes, supra; United States* v. *Shoshone Tribe,* 304 U.S. 111 (1938); *United States* v. *Creek Nation, supra; Yankton Sioux Tribe* v. *United States,* 272 U.S. 351 (1926).

Significantly, the Court in *Shoshone Tribe* relied upon non-Indian condemnation cases and applied the same standards to a taking of treaty-recognized Indian reservation lands as to property held in fee-simple ownership.[30] Conversely, the Court has relied without distinction upon *Shoshone Tribe* and other tribal taking cases in its decisions concerning claims by non-Indian property owners to just compensation

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tution declares that private property shall not be taken 'for public use without just compensation' " (135 U.S. at 659) and stated:

> The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; *provided only, that they are not taken without just compensation being made to the owner.*

(*Id.* at 657; emphasis supplied.)

[30] *See* 299 U.S. at 497. The principal cases relied upon were *Jacobs* v. *United States,* 290 U.S. 13 (1933); *Hurley* v. *Kincaid,* 285 U.S. 95, 104 (1932); and *United States* v. *Cress,* 243 U.S. 316, 327-30 (1917).

under the Fifth Amendment. *Kieselbach* v. *Commissioner of Internal Revenue,* 317 U.S. 399, 403 (1943) (the "value at the time of taking plus compensation for delay in payment equals just compensation"); *see also Albrecht* v. *United States,* 329 U.S. 599, 602 (1946); *Smyth* v. *United States,* 302 U.S. 329, 353-54 (1937).[31] The conclusion seems inescapable that no special rules have been established by the Court for just compensation claims by Indian tribes, but rather that the Fifth Amendment applies on exactly the same basis to a treaty-recognized Indian reservation as to any other lands and property in the United States.

The Government is simply wrong in contending that the Court "has consistently sustained every purported exercise of the power to control tribal property which could reasonably be said to benefit the tribe against tribal challenges that they were takings of property under the Fifth Amendment." (Govt. Br. 53; *see* pp. 50-54, *infra.*) Some of the just compensation cases considered by this Court, such as *Creek Nation, supra,* and *Shoshone Tribe, supra,* concern disposals of tribal property by the United States with no obvious benefits provided to the Indians.[32] Other cases,

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[31] Similarly, the courts of appeal never have distinguished Indian eminent domain cases on the ground that tribes were the property owners, but have relied upon the Indian cases interchangeably with non-Indian eminent domain cases. *E.g., Farrand Optical Co.* v. *United States,* 325 F.2d 328, 336 (C.A. 2, 1963); *United States* v. *Silver Queen Mining Co.,* 285 F.2d 506, 508 (C.A. 10, 1960); *Ericsson Line, Inc.* v. *United States,* 134 Ct. Cl. 767, 775-76 (1956); *United States* v. *Jordan,* 186 F.2d 803, 807 (C.A. 6, 1951); *United States* v. *Daily,* 116 Ct. Cl. 723, 733 (1950); *United States* v. *Playa de Flor Land & Improvement Co.,* 160 F.2d 131, 139 (C.A. 5, 1947).

[32] In *Creek Nation,* the United States conveyed treaty-recognized tribal land to non-Indian settlers (295 U.S. at 107). A question

like *United States* v. *Klamath & Moadoc Tribes, supra,* did involve circumstances where Congress paid inadequate value for the land.[33] Contrary to petitioner's thesis, in no case has this Court refused just compensation for recognized title lands on the ground that the Government made some payment to the Indians—and, indeed, in *Shoshone Tribe* the Court expressly rejected the Government's contention that no taking had occurred because the tribe suffered only a partial loss of its property (299 U.S. at 498). As the Court of Claims held in *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States,* 182 Ct. Cl. 543, 559, 390 F.2d 686, 695 (1968):

> It is true that, in many of the cases where a taking was held to have occurred, defendant paid nothing for the land. However, a payment of nothing is merely the clearest and most extreme example of the failure of Congress to pay full value. * * * There is no basis in reason to distinguish between no compensation, minimal compensation, or compensation arbitrarily determined.

In sum, this Court consistently and repeatedly has decided that the full protection of the Fifth Amendment applies, without qualification, to Indian recognized title lands. The just compensation clause deals with property, not people (*Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326 (1893)), and, accordingly, has been applied equally by the Court to the property of Indian tribes and other persons. This is simple justice and attention to the Constitution.

C. The United States never paid just compensation to the Sioux for the land and rights acquired under the Act of February 28, 1877.

As we read its brief, the Government does not here argue that the 1877 Act provided just compensation to the Sioux for the 7,345,157 acres of gold-rich land then taken by the United States. Petitioner claims that "the Congress of 1877 meant to give fair value for the Black Hills" (Govt. Br. 66; *see* pp. 62-71, *infra*) or that the Government over a 74-year period eventually spent on the Sioux more than their land and rights in 1877 were worth (see pp. 74-77, *infra*), and elsewhere asserts that "we must assume Congress deemed [its] undertaking a *fair* consideration. . . ." (Govt. Br. 63; emphasis in original.) Nowhere, though, does petitioner contend that the United States in fact paid the Sioux the full value of their property or, in other

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was raised as to whether, because the United States was trustee for the Creek Nation, such action amounted to a taking of the land (*id.* at 109). The Court held that the Government's power to control and manage Indian land was "subject to limitations inhering in such a guardianship *and to pertinent constitutional restrictions.*" (*Id.* at 110; emphasis supplied.) Thus, rather than granting the United States an exemption from Fifth Amendment requirements or extraordinary powers in disposing of Indian recognized title, the Court held that there were two limitations upon the Government, those imposed by its gurdianship and, in addition, the limits imposed by the Constitution.

[33] In the petition for a writ of certiorari, the Government conceded that the Indians were provided some compensation for the Klamath lands, but characterized the payment as "derisory." (Pet. 11.) Now the Government argues that the Indians were paid nothing at the time of taking, since the taking was authorized by a 1906 act and the inadequate payment was not appropriated until 1908. (Govt. Br. 56-57, n.48.) The court below, on the other hand, correctly described the *Klamath* taking and subsequent payment as "related parts of a single transaction." (Pet. App. 32a, n.7.)

The Court of Claims frequently has found a Fifth Amendment taking where the United States made some, but inadequate payment. *E.g., Ponca Tribe of Indians of Okla.* v. *United States,* 183 Ct.Cl. 673, 688 (1968); *see* cases cited at p.57, n.44, *infra.*

words, just compensation within the meaning of the Fifth Amendment.[34]

The Government's failure to claim actual payment of just compensation is understandable. The 1877 Act did not provide any payment to the Sioux at the time their lands and rights were acquired by the United States. Instead, Article 5 of the 1877 Act specified that, in "consideration" for the property taken, the United States agrees: (1) to furnish "all necessary aid to assist the said Indians in the work of civilization"; (2) to furnish the Sioux "schools and instruction in mechanical and agricultural arts," as provided under the Treaty of April 29, 1868, *supra;* and (3) to furnish the Sioux with subsistence consisting of "a ration for each individual of a pound and a half of beef, (or in lieu thereof, one half pound of bacon), one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs."

The Government's first promise contains no express commitment and is stated in such general terms as to have no ascertainable value. (A. 289.) In its second promise, the Government merely agreed to perform pre-existing obligations under the 1868 Treaty and so granted the Sioux nothing to which they were not already entitled.[35] As the Court of Claims determined,

[34] The United States has not sought review of the judgment of the Court of Claims awarding respondents $17.5 million as the 1877 value of the lands and rights acquired from the Sioux by the United States under the 1877 Act. (Pet. 8; Govt. Br. 4.)

[35] The Government's promise to assist in the "civilization" of the Sioux through education is also a standard public policy provision which the United States had long been inserting in Indian treaties, regardless of the size of the monetary payments being made or whether the tribe was ceding recognized title lands. *See, e.g.*, Treaty of July 3, 1868, 15 Stat. 673, with the Shoshone Tribe (Art. 7); Treaty of June 1, 1868, 15 Stat. 667, with the Navajo Tribe (Art. 6); Treaty of June 9, 1855, 12 Stat. 951, with the Yakima Tribe (Art. 5).

the promise to furnish the Sioux with rations is "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of the land" (Pet. App. 21a), and that undertaking fell far short of just compensation.

Specifically, the United States under the 1877 Act did not promise to provide all the Sioux unconditionally with subsistence for a finite period. The Government promised only to furnish rations until such time as the Sioux could support themselves.[36] In addition, the right of the Indians to receive rations was qualified by provisions that food would not be supplied to children between the ages of 6 and 14 who did not regularly attend a government school or to adults (and their families) who lived upon land suitable for cultivation but did not "labor." The court below found that these conditions and limitations "show that the government's undertaking to furnish rations to the Indians . . . was an attempt to coerce the Sioux into capitulating to congressional demands,"[37] not a payment for the land. (Pet. App. 26a-27a.)

[36] The court below concluded that "Congress hoped and anticipated that in a relatively short time the Sioux would learn the ways of civilized society and become self-sufficient." (Pet. App. 27a.)

[37] The debates on the Indian Appropriations Act of August 15, 1876, *supra*, and predecessor bills are replete with evidence that Congress viewed rations not as compensation, but primarily as a

Moreover, just compensation requires a more exact equivalent for the property taken than a promise to furnish rations to an indeterminate number of Sioux for an indeterminate number of years (*Monongahela Navigation Co.* v. *United States, supra*), particularly where both conditions were subject to the absolute control of the United States. Just compensation is not a *promise to pay,* much less a promise of an indefinite payment over an indefinite period of time. Just compensation is (1) "the value of the property at the time of the taking"[38] and (2) "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Jacobs* v. *United States,* 290 U.S. 13, 17 (1933), quoting *Seaboard Air Line R. Co.* v. *United States,* 261 U.S. 299, 306 (1923). Respondents can find no appellate case that has held, or in which the United States has asserted, that a conditional promise of future payments constitutes just compensation. In two district court cases, such arguments were made, rejected, and no appeal was taken. *United States* v. *9.94 Acres of Land,* 51 F. Supp. 478, 482-84 (E.D. S.C. 1943); *United States* v. *60,000*

mechanism of social control—a technique for keeping Indians on the reservation. *See, e.g.*, 4 CONG. REC. 1796 (Sens. Hitchcock and Bogy); 3502-3 (Cong. Randall); 3570 (Cong. Steele); 3902 (Sen. Windom). Indeed, for this reason, a Senate amendment to the legislation also required that the Sioux agree to receive "all supplies at such points on their said reservation, and in the vicinity of the Missouri River, as the President may designate * * *." 4 CONG. REC. 3902 (June 20, 1876).

[38] As put by Mr. Justice Holmes, speaking for the Court in *Old Dominion Land Co.* v. *United States,* 269 U.S. 55, 65 (1925):

> In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." (Citation omitted.)

Square Feet of Land, 53 F. Supp. 767 (N.D. Cal. 1943). The district court held in the latter case that "'just compensation' does not mean a promise, howsoever well intentioned, to perform an act in the future." 53 F. Supp. at 771.

Finally, the idea that Congress in 1877, or this Court today, would consider food to be just compensation for the lands and rights taken from the Sioux Nation is demeaning to the United States. The Sioux were in need of subsistence because the Government already had forced a cession of the major part of their homeland under the 1868 Treaty and had embarked upon a western settlement policy which was destroying the buffalo herds upon which their very existence depended. To argue under such circumstances that a promise of limited government rations constituted payment in full for the Black Hills is unconscionable. As the Senate Committee on Interior and Insular Affairs observed in 1974, when recommending legislation to eliminate food, rations and provisions from consideration as payments on a claim under section 2 of the Indian Claims Commission Act (pp. 26-27, *supra*):

> The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs.

To conclude, the Government's conditional promise to supply rations to the Sioux in accordance with the 1877 Act was not payment of just compensation under the Fifth Amendment for the land and rights then acquired by the United States—and petitioner, in effect, so concedes.

D. This Court's decision in *Lone Wolf* v. *Hitchcock* does not relieve the United States of its Fifth Amendment obligation to pay the Sioux just compensation.

Petitioner's principal argument is its contention that the Court in two cases has ruled "that legislation disposing of tribal property for the benefit of the tribe (but over its objection) did not constitute a taking under the Fifth Amendment," citing *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), and *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294 (1902). (Govt. Br. 53.) The cases do not so hold.

In *Cherokee Nation* v. *Hitchcock, supra,* the tribe sought to enjoin the Secretary of the Interior from leasing tribal property under an 1898 statute without the Indians' consent. The Cherokee Nation did not claim that the act was unconstitutional, but rather alleged that, since it owned the lands in fee simple, it possessed the right exclusive of Congress to control their use. 187 U.S. at 295, 298. The Court did not agree, holding that the tribe still was "in a condition of pupilage or dependency" and thus subject to the "plenary power of control by Congress." (*Id.* at 305, 306.) At the conclusion of its opinion, the Court observed that "[t]here is no question involved in this case as to the taking of property" (*id.* at 307), a sentence upon which the Government here seizes (Br. 53, n.44); the statement was true not because of any denial by the

Court of a Fifth Amendment claim, but because the Cherokee Nation did not and could not seek money damages or just compensation in a suit to which the United States was not a party .

Lone Wolf v. *Hitchcock, supra,* was a suit brought by the principal chief of the Kiowa Indians to enjoin the Secretary of the Interior from implementing a 1900 statute opening certain tribal reservation lands for allotment and sale to settlers.[39] Plaintiff there contended that Congress could not constitutionally dispose of the tribal lands unless three-quarters of the adult male Indians agreed in writing to the cession, as required under the provisions of a treaty comparable to Article 12 of the 1868 Sioux Treaty. 187 U.S. *supra* at 564. The Court rejected this position and held that Congress possessed the plenary power to break a treaty with an Indian tribe unilaterally. (*Id.* at 564-65.) The case turned upon the constitutional authority of Congress to act and serves as precedent in this case for the proposition, which respondents do not deny, that Congress had the power to take the Black Hills from the Sioux against their will and in violation of the 1868 Treaty.

The Court in *Lone Wolf* had no occasion to pass upon whether the 1900 Kiowa act gave rise to a claim for just compensation under the Fifth Amendment because that obvious follow-on question was not then open for adjudication.[40] The United States was not a

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[39] *Cf. Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 577 (1977); *Mattz* v. *Arnett,* 412 U.S. 481 (1973).

[40] *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919), cited by petitioner for the proposition that "the Court . . . had to conclude that the challenged statute would work no unconstitutional taking,

party and had not consented to suit. As the Court declared, "[i]f injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts." 187 U.S. at 568. In 1903, of course, no court had jurisdiction to hear and determine Indian tribal claims, including taking cases. (*See* pp. 19-20, *supra.*)

The relationship between Congress' ability under *Lone Wolf* to abrogate a treaty provision and the duty of the United States to pay just compensation where such abrogation disposes of Indian recognized title lands for less than their fair market value was specifically addressed by the Court in *Shoshone Tribe* v. *United States, supra:*

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566, 23 S. Ct. 216, 47 L. Ed. 299. *The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation.'"*

(299 U.S. at 497-98; citations omitted; emphasis supplied.) With the exception of *Cherokee Nation* v. *Southern Kansas R. Co., supra,*[41] all of the previously

else an injunction would have issued" (Govt. Br. 54, n.45), is not in point. The Court in *Lane* enjoined unauthorized Executive action, not the implementation of an act of Congress. *See also, United States* v. *Mille Lac Band of Chippewas,* 229 U.S. 498, 509-10 (1913).

[41] *See* p. 41, n.29, *supra.* The passage from *Cherokee Nation* to the effect that Indian tribal lands may not be taken "without just compensation being made to the owner" (135 U.S. at 657), was cited favorably in conjunction with *Lone Wolf* by the Court in *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 121-23 (1960).

discussed just compensation cases involving treaty-protected reservation lands arose after *Lone Wolf,* yet none construed its language as the Government here urges.[42] In the words of the court below: "In the *Lone Wolf* case, the Supreme Court was not required to, and did not, decide the legal issue whether, as a result of the 1900 statute, the Indians were entitled to recover just compensation for a fifth amendment taking." (Pet. App. 30a.)

One remaining aspect of *Lone Wolf*—while no longer good law—requires brief mention in order further to show the inapplicability of that decision to the present case. *Lone Wolf* was based primarily upon an interpretation of Congress' power as "a political one, not subject to be controlled by the judicial department of the government." 187 U.S. at 565. The political ques-

[42] In a later suit before the Indian Claims Commission, the tribal plaintiffs recovered a judgment against the United States for the difference between the amount paid for land under the 1900 Kiowa statute at issue in *Lone Wolf* and what the land at the time actually was worth. *See Kiowa, Comanche and Apache Tribes* v. *United States,* 4 Ind. Cl. Comm. 95 (1955). The Government here points out that no interest was awarded on the principal amount in that case (Govt. Br. 55, n.45), thus implying that the question of whether a Fifth Amendment taking was involved had been litigated and lost. The truth is different, for, as the Court of Claims carefully elucidated in its opinion on the *Kiowa* appeal, "we think that the issue regarding the allowability of interest is not actually before the court in this appeal [because the] petition of the Indians before the Indian Claims Commission does not state a claim arising under the Constitution * * *." *Kiowa, Comanche and Apache Tribes* v. *United States,* 143 Ct. Cl. 534, 544, 163 F. Supp. 603, 610 (1958), *cert. denied,* 359 U.S. 934 (1959).

tion doctrine has been narrowed in recent years. *See Baker* v. *Carr,* 369 U.S. 186 (1962); *United States* v. *Nixon,* 418 U.S. 683 (1974). Moreover, the concept that Indian legislation is immune from judicial scrutiny was expressly repudiated by this Court in *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73 (1977):

> The statement in Lone Wolf, supra . . ., that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties [citation omitted], has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See, e.g., Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."

(430 U.S. at 84; citations omitted.) The currency of the Indian political question concept in 1903 and its rejection today demonstrate additionally why *Lone Wolf* cannot be treated as authority for the Government's argument that "legislation disposing of tribal property for the benefit of the tribe" is beyond the reach of the Fifth Amendment.

To conclude, nothing in this Court's holding in *Lone Wolf* v. *Hitchcock, supra,* relieves the United States of its constitutional obligation to pay the Sioux just compensation for the taking of their lands and rights under the Act of February 28, 1877, *supra.*

II. The 1877 Act Effected a Taking of the Black Hills Country for Which the Sioux Are Entitled to Just Compensation Even Under the More Stringent "Good Faith Effort" Test for Fifth Amendment Violations Invoked by the Court Below.

A. Introduction

For years after this Court's decision in *Shoshone Tribe* v. *United States, supra,* the Court of Claims adhered faithfully to the principle that under the Fifth Amendment the United States must pay full value when treaty-protected Indian lands are taken—fair market value as of the date of taking plus interest as a measure of just compensation until the date of payment.[43] In 1968, however, the court below abandoned that eminently sensible rule. Perceiving a need for reconciling the plenary power of Congress to break treaties, reflected in *Lone Wolf* v. *Hitchcock, supra,* with the constitutional obligation of the United States to pay just compensation for the taking of tribal reservation lands, as determined in *Klamath, Shoshone Tribe* and *Creek Nation, supra,* the Court of Claims created a "good faith effort" test for Fifth Amendment claims in Indian litigation. In the lead case of *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States,* 182 Ct. Cl. 543, 390 F.2d 686 (1968), the court below concluded:

> . . . it is the good faith effort on the part of Congress to give the Indians the full value of their

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[43] *E.g., Navajo Tribe* v. *United States,* 176 Ct. Cl. 502, 545-46, 364 F.2d 320, 345-46 (1966); *Sioux Tribe* v. *United States,* 161 Ct. Cl. 413, 315 F.2d 378 (1963); *Miami Tribe of Okla.* v. *United States,* 150 Ct. Cl. 725, 742-44, 281 F.2d 202, 212-13 (1960), *cert. denied,* 366 U.S. 924 (1961); *Uintah and White River Bands of Ute Indians* v. *United States,* 139 Ct. Cl. 1, 152 F. Supp. 953 (1957); *Rogue River Tribe of Indians* v. *United States,* 105 Ct. Cl. 495, 547-48 (1946); *Nez Perce Tribe* v. *United States,* 95 Ct. Cl. 1, 6-8, 11 (1941).

> land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking.

182 Ct. Cl. at 557, 390 F.2d at 693; *see also Klamath and Modoc Tribes* v. *United States,* 193 Ct. Cl. 670, 684-85, 436 F.2d 1008, 1015 (1971). The majority of the Court of Claims, as well as Judge Nichols in his concurring opinion, invoked the above-described good faith effort test as the controlling precedent for determining whether a taking had occurred in this case. (Pet. App. 9a-12a, 39a-48a.)

This Court never has considered or approved the good faith effort test. The Sioux submit that the lower court's test improperly departs from the command of *Shoshone Tribe* and related decisions of this Court, impermissibly treating Indian tribes differently from non-tribal property owners (*see* pp. 41-45, *supra*), and is ill-conceived, unnecessary and erroneous. Nonetheless, even applying the good faith effort test—which is more favorable to the Government than the standard provided in all non-tribal eminent domain cases—the Court of Claims held that the Act of February 28, 1877, *supra,* effected a taking of the Sioux Black Hills country in violation of the Fifth Amendment.

In so ruling, the court below explained that its good faith effort test contemplates "an objective inquiry into the nature and purpose of the congressional action, not an attempt to determine the subjective motive of the legislature in taking that action." (Pet. App. 11a; *see* p. 30, *supra.*) As the court further stated,

"[t]he critical inquiry is what Congress did—and how it viewed the obligation it was assuming—at the time it acquired the land. . . ." [44] (Pet. App. 28a.) To ascertain such facts, the Court of Claims relied upon the "Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition." (*Id.* at 11a.) Based upon

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[44] This formulation of the good faith effort test is even more favorable to the United States than the standard originally promulgated and heretofore applied by the court below. In *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* for example, the court found that no Fifth Amendment taking had occurred with respect to "homestead lands," where the Indians were to receive the purchase price paid by non-Indians, because Congress had appointed a special commission "to classify and appraise the land" and there was "no evidence or suggestion that the commission did not act in perfect good faith and do its best to find reasonable prices." 182 Ct. Cl. at 557; 390 F.2d at 694. In the same case, on the other hand, the court found that a Fifth Amendment taking of tribal property had occurred with respect to "school lands" turned over to the State because "Congress simply said the land was worth $2.50 per acre, but made no effort to determine whether that was what the land was truly worth." 182 Ct. Cl. at 559, 390 F.2d at 694-95. Similarly, in *Confederated Salish and Kootenai Tribes* v. *United States,* 193 Ct. Cl. 801, 437 F.2d 458 (1971), the court below found a taking in violation of the Fifth Amendment, where Congress had appropriated $30,000 to pay for 18,523 acres of tribal land set aside as a "permanent national bison range," because, in acquiring such property "for 'just the figure Congress wanted to pay', defendant 'was exercising its power of eminent doman * * *'." 193 Ct. Cl. at 814, 437 F.2d at 465. In short, until this case the Court of Claims insisted that Congress provide for an objective appraisal of the Indians' lands in order to satisfy the good faith effort test (*see Klamath and Modoc Tribes* v. *United States, supra,* 193 Ct. Cl. at 687, 436 F.2d at 1016), and how Congress "viewed the obligation it was assuming" did not constitute sufficient compliance.

a thorough analysis of these legislative materials (*id.* at 12a-26a), the court concluded that the background of the 1877 Act "did not reflect or show any considered judgment by Congress that it was paying a fair price" for the Black Hills (*id.* at 25a), and thus that the statute resulted in a Fifth Amendment taking.

The following discussion is intended to demonstrate that the Court of Claims was right, assuming, *arguendo,* that the good faith effort test is valid.

B. The Grant Administration's conduct towards the Sioux through passage of the 1877 Act constitutes the rankest case of dishonorable dealings in our nation's history.

The sordid story of the Government's treatment of the Sioux during the period leading up to the taking of the Black Hills country pursuant to the Act of February 28, 1877, *supra,* has been set forth in detail in respondents' background statement. In order to place the issue of "good faith" in proper factual context, a brief summary of that activity follows:

1. Under the Treaty of April 29, 1968, *supra,* the United States promised the Sioux that the Great Sioux Reservation was set aside for their exclusive use and occupancy, that non-Indians would be barred from the reservation, and that no cession of any portion of the reservation would be valid without the written consent of three-quarters of the adult male Indians. In less than ten years, the Government broke each of these promises. (Pp. 6-8, *supra.*)

2. During the summer of 1874, the Grant Administration sent an expedition under the command of Lt. Col. Custer into the Black Hills to

report upon its mineralization, the Custer expedition not only discovered but also widely publicized the gold deposits there, and the Government thus stimulated an illegal invasion of the Great Sioux Reservation by white miners and settlers. (Pp. 8-9, *supra.*)

3. Seizing upon the presence of the miners as an excuse, the Grant Administration early in 1875 began to pressure the Sioux to sell the Black Hills. The Allison Commission, appointed by the Secretary of the Interior to negotiate with the Sioux for such a cession, however, could not reach an agreement because, in the words of the later Manypenny Commission, "they had no authority to offer them [the Sioux] any sum which would be a just equivalent for their right in the Black Hills, or which gave to the Indians hopes for the future." (Pp. 9-12, *supra.*)

4. Frustrated by the Sioux' refusal voluntarily to sell the Black Hills and relinquish their off-reservation rights, President Grant in November 1875 secretly ordered the Army to evacuate the Black Hills area and cease opposition to the miners, thus inviting a further invasion of the Great Sioux Reservation in violation of Article 2 of the 1868 Treaty. At the same time, the Secretary of the Interior and the Commissioner of Indian Affairs urged Congress to terminate essential appropriations for Sioux subsistence until the Sioux agreed to give up their gold country. (Pp. 12-13, *supra.*)

5. To exert further pressure upon respondents, the Secretary of the Interior in December 1875 di-

rected the Sioux, who were peacefully and lawfully hunting west of the Great Sioux Reservation in accordance with Article 16 of the 1868 Treaty, to return to the reservation by January 31, 1876, or face military punishment. Although the severe winter weather prevented the Indians from meeting this deadline, the Secretary notified the Secretary of War on February 1, 1876, that the Sioux had failed to comply with his order and were being turned over to the Army for appropriate action. (Pp. 14-15, *supra.*)

6. The Army commenced a war of attrition against Sioux men, women and children during the spring of 1876. Following Custer's defeat at Little Big Horn, Congress approved a rider to the 1876 Indian Appropriations Act which cut off all future rations even for peaceful Sioux bands unless the Indians first agreed to cede the Black Hills, to relinquish their off-reservation hunting rights and to grant three right-of-ways through the Great Sioux Reservation. In substance, Congress adopted the Grant Administration's recommendation that the Sioux be made to sell or starve. (Pp. 15-16, *supra.*)

7. The Manypenny Commission, appointed by the President to negotiate with the Sioux, met with respondents during the autumn of 1876. By this time, the bulk of the Sioux had been disarmed, dismounted and confined within the Great Sioux Reservation, and made wholly dependent upon the United States for their subsistence. Notwithstanding their helpless condition and the ultimatum contained in the 1876 Act, less than 10% of the adult male Sioux consented to the Black Hills cession

agreement proposed by the Commission, which thus did not meet the requirement in Article 12 of the 1868 Treaty for a 75% affirmative vote. The Manypenny Commission, though, submitted the purported agreement to the President, who in turn submitted it to Congress as if it were valid. (Pp. 16-17, *supra.*)

As the Court of Claims has declared, "the duplicity of President Grant's course and the duress practiced upon the starving Sioux, speak for themselves. A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history * * *." *United States* v. *Sioux Nation,* 207 Ct. Cl. 234, 241, 518 F.2d 1298, 1302 (1975) (A. 261). Certainly the Government cannot point to the foregoing record as evidence that the Grant Administration demonstrated any discernible "good faith" in its dealings with the Sioux Nation.

In order to blunt this conclusion and show an alleged congressional good faith effort to compensate the Sioux, petitioner repeatedly refers to statements made in 1875 by President Grant, Commissioner of Indian Affairs Smith and the Allison Commission to the effect that respondents should be paid "a fair and full equivalent" for the Black Hills. (Govt. Br. 15-16, 18, 23, 64.) At the time these statements were made, however, the individuals involved had no factual basis for determining what a "full equivalent" for the Sioux land might be, since the Black Hills country had not then been scientifically investigated or appraised. (*See* p. 12, *supra.*) Moreover, their proposals later were rejected by Congress.

Commissioner Smith, for example, recommended that a *portion* of the Government's payment for the Black Hills "should be made to take the place of the free rations now granted" (A. 151), whereas the 1877 Act provided that rations shall be the entire "consideration" for the Black Hills gold fields, plus respondents' rights under Articles 11 and 16 of the 1868 Treaty and three right-of-ways through the Great Sioux Reservation. Similarly, the Allison Commission urged the creation of a fund out of the proceeds paid to the Indians for the Black Hills, a portion of which might be used for subsistence (A. 193-94), while President Grant never mentioned rations, suggesting to the Sioux instead that their money ("full equivalent in value") for the Black Hills "be paid out in U.S. bonds and deposited here [in Washington], so that the interest would be drawn twice a year for your benefit, and expended for your benefit each year as might be agreed upon. . . ." (A. 214.) Congress never discussed establishment of any such fund for the Sioux and the 1877 Act incorporated neither of these executive proposals.

In light of the entire record, therefore, as contrasted with petitioner's selected phrases out of context, Congress may not be said on the basis of 1875 statements by President Grant, the Allison Commission or Commissioner Smith to have exerted a good faith effort in 1877 to provide the Sioux a fair equivalent for their property.

C. The legislative histories of the 1876 Act and the 1877 Act show that Congress did not make a good faith effort to pay the Sioux full value for the Black Hills country.

The court below carefully examined the legislative background of the Act of February 28, 1877, *supra,* to

determine whether Congress then undertook in good faith to furnish the Sioux a full equivalent for the Black Hills and found no such evidence. (Pet. App. 12a-28a.) In short, the court found that Congress did not even discuss the value of the property being acquired from respondents by the United States or what compensation was being paid for the land, much less whether the compensation was fair or adequate. (*Id.* at 24a.) In order to demonstrate the indubitable accuracy of the Court of Claims' conclusion, the legislative record is here discussed in detail.

1. *Legislative History of the 1876 Act:* The legislative antecedent of the 1877 Act was the Indian Appropriations Act of August 15, 1876, *supra,* and the legislative antecedent of the "sell or starve" Sioux rider to the 1876 Appropriations Act was S. 590, 44th Cong., 1st Sess., a bill "providing for an agreement with the Sioux Nation in regard to a portion of their reservation. . . ." (Pet. App. 18a; A. 328-8b.) As reported by the Senate Committee on Indian Affairs on March 15, 1876, S. 590 provided for a commission to negotiate with the Sioux for a cession of the Black Hills, in return for which the United States would provide the Indians with subsistence for not more than ten years; the bill further provided that, unless the Sioux agreed to a cession by July 1, 1877 (more than a year later), appropriations for subsistence would be terminated. (*Ibid.*) The bill was the subject of extensive debate in the Senate on March 20 and 21, but then was temporarily set aside. 4 CONG. REC. 1796-1801, 1829-30, 2177. Debate on S. 590 resumed in the Senate on June 3, 1876 (*id.* at 3530 *et seq.*), at which time the bill was amended to eliminate all reference to the termination of subsistence and to provide merely for the appointment of

a commission to negotiate with the Sioux "for the cession to the United States of the rights of said tribe to the country known as the Sioux reservation, Dakota, and territory adjacent or otherwise for the preservation of peace." (*Id.* at 3539; Pet. App. 18a-19a.) As passed by the Senate, therefore, S. 590 was non-coercive.

In the House of Representatives, S. 590 first was referred to the Committee on Indian Affairs (4 CONG. REC. 3743, June 10, 1976) and then was reported by that committee on June 15, 1876. (*Id.* at 3817.) As reported, the bill contained another amendment which permitted the proposed commission to negotiate for the acquisition of a "portion" of the Great Sioux Reservation, or, in other words, the Black Hills. (A. 328e-f.) The bill, however, was sent back to the committee and several later motions to reconsider were defeated. (Pet. App. 19a; 4 CONG. REC. 3817, 4470, 4520.) As considered by the House of Representatives, S. 590 never contained a provision for the termination of existing Federal assistance to the Sioux or any other provision for forcing respondents to sell their lands.

Meanwhile, the House of Representatives on June 2, 1876, began consideration of H.R. 3478, a bill to provide appropriations for the Indian Department, which provided, *inter alia,* that no portion of an appropriation of $1 million for feeding the Sioux "shall be available or be used for that purpose unless the said Indians shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the said treaty for said Indians," *i.e.,* the hunting area and unceded Indian territory reserved by the Sioux under Articles 11 and

16 of the 1868 Treaty, respectively. (Pet. App. 19a; A. 328b-d.) After considerable debate on this portion of the bill (4 CONG. REC. 3503-08, June 2, 1876), which, however, was not then amended, and on other features of the legislation, H.R. 3478 passed the House on June 6, 1876. (*Id.* at 3639.) The House version of H.R. 3478, therefore, called for the termination of rations, but not for a cession of the Black Hills.[45]

The Senate Committee on Appropriations, on the other hand, substantially revised the Sioux portion of H.R. 3478 and that change was ratified in the Senate on June 20, 1876. (*Id.* at 3902.) Specifically, the Senate amendment provided that no sums appropriated for the Sioux "shall be paid to any tribe thereof while said tribe is engaged in hostilities against the white people" and further provided that one-half the current appropriation for Sioux subsistence ($1 million) would be suspended until the Indians agreed not only to relinquishment of their rights outside the Great Sioux Reservation, but also to a cession of the Black Hills. (A. 328d.) The House refused to accept the Senate amendments to H.R. 3478 (4 CONG REC. 4043, June 22, 1876), so successive conference committees were appointed. (*Id.* at 4043, 4057, 4324, 4563, 5463, 5539.) Agreement was not reached until August 14, 1876 (*id.*

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[45] Petitioner argues that H.R. 3478, as passed by the House, "did not address the Black Hills question evidently because S. 590 was already pending in the House." (Govt. Br. 27, n.19.) This assertion is rank speculation, admittedly unsupported by a scintilla of evidence in the record, and seems patently untrue in view of the fact that the House considered H.R. 3478 on June 2 or almost two weeks before it considered S. 590 (June 15). In light of the House committee's action on S. 590, a more logical assumption would be that the House of Representatives at the beginning of June was not yet in a mood to force the Sioux into a Black Hills land cession.

at 5596), more than a month after news of the Army's defeat at Little Big Horn had arrived in Washington.[46] As previously stated (p. 15, *supra*), Congress approved the legislation with a proviso that no future appropriations would be made for Sioux subsistence unless the Indians first agreed to give up their off-reservation rights under Articles 11, 15 and 16 of the 1968 Treaty, to sell the Black Hills portion of the Great Sioux Reservation and to grant right-of-ways through the remainder of the reservation.

Petitioner challenges the Court of Claims' suggestion that the conference committee toughened the Sioux rider to the Indian Appropriations Act of August 15, 1876, *supra,* in response to Custer's defeat, arguing that this difference between the House and Senate versions of H.R. 3478 had been reconciled by July 1, 1876. (Govt. Br. 28, 30.) The record, however, does not show, and there is no way now of learning, what the conferees might have agreed upon with respect to the Sioux rider before the outcome at Little Big Horn on June 25 became known in Washington. What the record does show is that the conference committees met on a number of occasions after Custer's death was confirmed and that the conferees thus had ample opportunity to revise the Sioux rider. What is also known is that the bill which emerged from the conference committee on August 14, and which became the 1876 Act, was far more coercive and harsher upon the

[46] Petitioner concedes that news of Custer's death reached Washington on July 5, 1876, but claims that two days later Congress still did not know the accuracy of this report. (Govt. Br. 30.) Congress obviously did know its accuracy well before July 15, 1876, when the House of Representatives considered H.R. 3894, a bill for the relief of Elizabeth Custer, widow of George A. Custer. 4 CONG. REC. 4627-28.

Sioux than the Senate version of S. 590, approved June 3, 1876, and the House version of H.R. 3478, approved June 6, 1876.[47] The court below, therefore, had sound grounds for concluding that congressional outrage over a military debacle led directly to a legislative ultimatum.

For purposes of this litigation, however, whether the final text of the Sioux rider reflected a reaction to Custer's defeat, or stemmed from a more generalized congressional frustration over the costs of an Indian war and the unwillingness of the Sioux voluntarily to cede the Black Hills, is not significant. The critical element in the legislative history of the 1876 Act is the fact that, in all of the debate over S. 590 and H.R. 3478, not one member of Congress ever mentioned, much less discussed, the value of the Black Hills[48] or whether

[47] Petitioner also argues that the 1876 Act was "more generous [sic]" than the Senate version of H.R. 3478. (Govt. Br. 28.) In this regard, however, the minor language change to which the Government pointedly refers—*i.e.*, "tribe" to "band"—was not substantive in content, but a mere technical amendment to characterize the Sioux "tribes" we know today as "bands", which is what they were called in both the 1868 Treaty and the 1877 Act. In addition, whether cutting off 50% of the Sioux rations for one year is more or less harsh than cutting off 100% of the Sioux rations in all subsequent years is a debatable and, for purposes of this case, irrelevant question.

[48] *See* p. 74, n.52, *infra*. As previously noted (p. 10, n.8, *supra*), Walter P. Jenney, on instructions from President Grant, conducted a topographical and geological survey of the Black Hills during the summer of 1875. (A. 310.) Petitioner observes that the Jenney report was transmitted to the Senate on April 21, 1876 (Govt. Br. 26, n.18), and attempts to imply that Congress considered that report in arriving at an "equivalent" for the Black Hills. (*Id.* at 64.) This thesis has absolutely no merit. First, the Jenney report could not form a base for calculating a value equivalent because, as the Government concedes, the report did not

subsistence would be a reasonable substitute for the Sioux Nation's property.[49] As the Court of Claims found, "[t]here is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they could support themselves, constituted the fair equiva-

specify "even an approximation of the worth of the Black Hills. . . ." (*Id.* at 16.) Second, the Jenney report is not mentioned once in the legislative histories of the 1876 Act and the 1877 Act. Lastly, as the Indian Claims Commission concluded, Jenney could not have furnished an accurate valuation for the Black Hills gold, since the greatest mineral wealth there came from quartz (lode gold) deposits, the expedition did not carry equipment for testing quartz deposits and the expedition did not enter the northern part of the Black Hills, site of the Homestake Mine, where the more extensive quartz lodes were discovered. (A. 310, n.3.)

[49] A significant colloquy during the Senate debate on the Appropriations Committee amendment to H.R. 3478 clearly establishes that Congress did not perceive Sioux rations as consideration for relinquishment of the Black Hills. Senator Kernan of New York there asked whether the appropriation of $1 million for subsistence of the Sioux "is a pure gratuity for which we require them to give us some of their land until they give us grants of right of way, or whether it is money that we are to appropriate anyhow to make them give up the Black Hills country, as it is called, and grant rights of way, or whether we are making a new agreement to be binding by an act of Congress." 4 CONG REC. 3902 (June 20, 1876). To this question, Senator Windom, floor manager of the bill, responded:

> "It is a fact, I will say to the Senator from New York, that the $1,000,000 appropriated is a pure gratuity. We are under no treaty obligation to grant it. But it is not only a gratuity but a necessity, I suppose. The committee have thought that if we were compelled to grant this large amount of money for their subsistence, they should be required to relinquish this outside territory, a small portion, comparatively, of their reservation. *We make this gratuity on the condition of that relinquishment, hoping it will preserve the peace in that country.*"

(*Ibid;* emphasis supplied.)

lent of the value of the lands the United States was acquiring from them." (Pet. App. 26a.)

2. *Legislative History of the 1877 Act:* In accordance with the Act of August 15, 1876, *supra,* the President appointed a commission, headed by George W. Manypenny, to negotiate an agreement calling for "certain concessions from the Sioux. . . ." (Pet. App. 19a-20a.) The instructions to the Manypenny Commission, referring to the Sioux rider in the Appropriations Act, stated that "the Indians should be made to understand distinctly that they can hope for continued appropriations only by full submission to the authority and wishes of the Government. . . ." (*Ibid.*) The Manypenny Commission's report observed that the commissioners "accepted the trust confided to them under the grave responsibility that if they failed in their mission the twenty thousand friendly Indians at the agencies must either starve or join the hostile Indians" (*ibid*), but also that we "submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular." (*Id.* at 20a; *see* pp. 16-17, *supra.*) As the Court of Claims found, though, nowhere in its report did the Manypenny Commission indicate "that it believed the provisions for rations constituted a fair equivalent for the value of the Black Hills lands the Indians were surrendering." (Pet. App. 22a-23a.)

President Grant submitted the Manypenny Commission report to Congress, together with an "agreement", executed by less than 10% of the adult male Sioux, which provided for the cessions specified in the 1876 Act, but violated Article 12 of the 1868 Treaty. On January 26, 1877, the Senate Committee on Indian

Affairs reported S. 1185, a bill to "ratify and confirm" the purported Sioux agreement. 5 CONG. REC. 983. The Senate passed the bill the next day. The Senate debate was concerned almost exclusively with the possible removal of the Sioux from their South Dakota reservation to Indian Territory, a provision in the agreement which the Senate Committee had deleted. (*Id.* at 1055-58; Pet. App. 23a.) The sole references to the Black Hills during this discussion were Senator Allison's comment that "[i]t is an imperative necessity that so much of this agreement as provides for the relinquishment of that vast area of territory which lies west of this boundary should be at once placed in the possession and under the control of the Government of the United States . . ." (5 CONG. REC. 1057), and his additional description of the Black Hills area as "valuable lands, made valuable by the discovery of mineral products there. . . ." (*Id.* at 1058.)

The House of Representatives passed S. 1185 less than three weeks later on February 15, 1877. (*Id.* at 1617.) As in the Senate, the House debate dealt almost entirely with the possible removal of the Sioux to Indian Territory. (*Id.* at 1615-17; Pet. App. 23a.) Three Congressmen—Seelye, Boone and Crounse—spoke of the great importance of the bill and the necessity for speedy passage so that the laws of Dakota Territory could be extended into the existing Black Hills mining settlements. (5 CONG. REC. 1615-16.) Congressman Boone further remarked:

> The Black Hills country is to the people of the United States a valuable country. This agreement concedes the Black Hills territory to the Government of the United States, in consideration of which we make provision for feeding these Indians upon the Missouri River at points contiguous to the means of transportation, *so that there will be a saving to the Government in feeding the Indians, in addition to the transfer of this valuable country to the United States.*[50]

(*Id.* at 1615; emphasis supplied.) No further reference was made to the Black Hills. In short, as the Court of Claims determined, there was in Congress a complete "lack of any discussion of whether the 'consideration' provided by the United States was adequate consideration for the lands surrendered. . . ." (Pet. App. 24a.)

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[50] Congressman Boone mistakenly believed that, after implementation of the 1877 Act, the Sioux would "be placed on a part of the reservation which they now hold which is susceptible of cultivation. . . ." 5 CONG. REC. 1615. To the contrary, as the Allison Commission said of the Great Sioux Reservation outside the Black Hills:

> Our observation leads us to the conclusion that the character of this region is such that farming operations are impracticable, even when conducted by those familiar with the best methods. Small tracts could be made productive by means of expensive irrigation, but the volume of water is not sufficient to irrigate on an extensive scale, even if the country were suitable.

(A. 178.) In its conclusion, the Allison Commission reiterated with respect to the Sioux: "Their reservation, extending over an area as large as New England, is, for the most part, unsuited to agriculture." (A. 194.) At a later point in the House debate on S. 1185, Congressman Seelye advised his colleagues:

> Their removal is an absolute necessity. These Indians are now where even the most cultivated white man could not obtain a living with all his knowledge of agriculture.

5 CONG. REC. 1617 (February 15, 1877). Indeed, the notorious unsuitability of the Great Sioux Reservation for agriculture is exactly the reason the Manypenny Commission sought removal of the Sioux to the Indian Territory. (A. 106-7.)

D. The 1877 Act did not provide the Sioux a fair and full equivalent for the property acquired by the United States.

In analyzing the Act of February 28, 1877, *supra,* the Court of Claims observed that "an essential element of the inquiry . . . is determining the adequacy of the consideration the Government gave for the Indian lands it acquired."[51] (Pet. App. 11a-12a.) The few prior decisions of the court below concerning the good faith effort test have stressed that the procedure Congress establishes for fixing the amount of the payment is significant in deciding whether the Government actually intended fully to compensate the Indians for the taken lands. Thus, where Congress provided for a competent and impartial appraisal of the lands to be disposed of, the court below has held that Congress made a good faith effort to furnish fair value. *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* 182 Ct. Cl. at 557-58, 390 F.2d at 693-94; *Klamath and Modoc Tribes* v. *United States, supra,* 193 Ct. Cl. at 687, 436 F.2d at 1016. Where Congress, on the other hand, has set the amount of compensation arbitarily or for some apparent reason other than providing fair value to the Indians, the court below has ruled that no good faith effort

[51]While the Government argues that the mere recital in the 1877 Act that rations were "consideration" forecloses any examination into whether the consideration was adequate (Govt. Br. 63), the court below correctly analyzed the value of the consideration promised, together with the factual background and legislative history of the statute. As the court observed, "[t]hat inquiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." (Pet. App. 12a.) The determination of just compensation is a judicial function. *Seaboard Air Line R. Co.* v. *United States,* 261 U.S. *supra* at 304; *Monongahela Navigation Co.* v. *United States,* 148 U.S. *supra* at 327.

was made and thus a taking occurred. *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* 182 Ct. Cl. at 559, 390 F.2d at 693; *Confederated Salish and Kootenai Tribes* v. *United States,* 193 Ct. Cl. 801, 814, 437 F.2d 458, 465 (1971).

If the good faith effort test, as initially promulgated and heretofore applied by the Court of Claims, were here invoked, further inquiry into the question whether the 1877 Act constituted an exercise of the Government's eminent domain power would be unnecessary. (*See* p. 57, n.44, *supra.*) Congress did not provide for an objective appraisal of the Black Hills and the compensation promised was arbitrarily fixed by Congress, not the result of "meaningful negotiation or arm's-length bargaining". (Pet. App. 25a.) The conclusion inexorably follows under the original good faith test that the 1877 Act effected a Fifth Amendment taking of Sioux lands and rights. In this case, however, in reaching the same final decision, the court below bent over backwards to favor the Government by looking into the question of how Congress "viewed the obligation it was assuming" (*id.* at 28a) or, more particularly, whether some ascertainable relationship existed, and was known to Congress, between the value of the "consideration" and the value of the property acquired by the United States.

In its extensive analysis of the "consideration" provided under the 1877 Act, the Court of Claims observed that "the requirement to furnish them with rations until they become self-sufficient" was "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of land." (Pet. App. 21a.) As has

already been shown (pp. 62-71, *supra*), the record contains no evidence that Congress, in approving the 1876 and 1877 Acts, believed that, or even considered whether, the obligation it was assuming to furnish subsistence to respondents represented a fair and full equivalent for the value of the Black Hills. As has also been demonstrated heretofore (pp. 45-50, *supra*), the Government's conditional promise to provide an indeterminate number of Sioux with rations for an indefinite period did not in fact constitute just compensation.

Petitioner does not seriously dispute the foregoing points.[52] Instead, the Government attempts retrospectively to construct a good faith effort on the part of Congress to pay the Sioux full value for their property by arguing: (1) that the United States has spent $43 million for Sioux subsistence since 1877 and thus more than the lands and rights taken were worth; (2) that 900,000 acres added to the Great Sioux Reservation under the 1877 Act were part of the consideration for the Black Hills; and (3) that the court below incorrectly placed the burden of proving congressional "good faith" upon the United States. None of these arguments is valid.

1. *Government expenditures pursuant to the 1877 Act*: Petitioner's attempt to find refuge in the claimed expenditure of $43 million for Sioux subsistence dur-

[52] In the legislative histories of the 1876 and 1877 Acts, petitioner managed to locate one reference, which it twice cites, in the March 15, 1876 version of S. 590 to paying the Sioux "a proper equivalent for the use and occupation of the Hills by the whites. . . ." (Govt. Br. 24, 64; *see* A. 328.) Aside from the obvious vagueness of the reference, petitioner neglects to tell the Court that the quoted words were stricken from S. 590 by the Senate on June 3, 1876. 4 CONG. REC. 3539; *see* A. 328e.

ing a 74-year period up to June 30, 1951, is wholly irrelevant. The issue of whether the 1877 Act effected a taking under the Fifth Amendment turns upon what Congress did in 1877, not upon unforeseen and unforeseeable events which occurred 20, 40 or 70 years afterwards. (Pet App. 28a.) What Congress did in 1877 was to forego any payment to the Sioux at the time their land and rights were acquired by the United States. The Government merely promised to furnish rations until such indeterminate time as the Sioux could support themselves. In addition, the right of the Indians to receive rations was qualified by provisions that food would not be supplied to children between the ages of 6 and 14 who did not regularly attend a government school or to adults (and their families) who lived upon land suitable for cultivation but did not "labor." Just compensation is not such a conditional promise, but rather requires an exact and full equivalent for the fair market value of the land.

In any event, the Government's claim to have expended $43 million[53] for Sioux rations under the 1877

[53] On one occasion, petitioner claims that "the United States . . , pursuant to the 1877 Act, appropriated over $57 million in material assistance betwen 1877 and 1951." (Govt. Br. 36.) This larger figure of $57 million for alleged expenditures on Sioux subsistence is based upon a concession of former Sioux counsel at an early stage in these proceedings. *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 234 at n.2 (Ct. Cl. 1956). As the Court of Claims later observed, former counsel's theory of the case was "improper" (A. 260), and the court below vacated its judgment of affirmance on new Sioux counsel's motion that respondents had not been represented adequately, as evidenced, *inter alia*, by the foregoing erroneous concession of fact by their predecessor. 182 Ct. Cl. 912 (1968); see pp. 20-21, *supra*, and *Sioux Tribe* v. *United States*, 205 Ct. Cl. 148, 182-83, 500 F.2d 458, 476 (1974). Former counsel's concession as to the amount spent by the Government for rations thus was invalidated more than 20 years ago. (*See* A.

Act is unsubstantiated, and, as the court below correctly observed, "[t]he parties disagree over the precise amount of those expenditures." (Pet. App. 9a.) The genesis of petitioner's figure is a finding by the Court of Claims in *Sioux Tribe* v. *United States,* 97 Ct. Cl. 613, 655-56 (1942) (A. 234). As respondents heretofore have pointed out (p. 6, *supra*), the Act of March 13, 1978, *supra,* provides that the Sioux Black Hills claim shall be determined "without regard to the defense of res judicata or collateral estoppel. . . ." For purposes of this case, therefore, the 1942 finding of the Court of Claims is a nullity.[54]

Petitioner will argue, presumably, that the General Accounting Office report upon which the 1942 finding of the court below was based is part of the record in this case. (*See* Govt. Br. 36, n.25.) The Commission, however, properly rejected such evidence[55] and ordered

260, 265; *see also* Govt. Br. 42 at n.33.) For petitioner now to attempt to resurrect that concession, as if it had some legitimate status before the Court, is shocking.

[54] Even in the absence of the 1978 Act, the recitation of the Court of Claims in *Sioux Tribe* would not have possessed evidentiary value or been binding upon the parties in these proceedings, since, as the Indian Claims Commission determined, the issue of "consideration" was not litigated in 1942. (A. 287-88.)

[55] The Commission's rationale for refusing to give any credence to the Government's accounting reports is obvious. The General Accounting Office merely listed gross appropriations under a label, "1877 Act." The reports do not show: (a) whether the appropriations in fact were spent for Sioux rations; (b) whether such rations as the United States purchased in fact were delivered—an eminently logical question given the Manypenny Commission's vivid description of short-weighting in the distribution of beef to the Sioux (A. 116-17); (c) whether the rations were diverted or used by government personnel; (d) whether the rations were delivered to children between the ages of six and fourteen who were not attending school (and thus not entitled to subsistence under

the Government to prepare a new accounting report. (A. 292.) The United States never appealed from that ruling, but also never followed the Commission's directive to prepare a new statement of claimed expenditures under the 1877 Act, so the record does not contain a shred of competent evidence showing that the United States spent $43 million [56] or any other sum for Sioux rations. Moreover, even if some portion of that amount could be proved, the court below correctly recognized that the subsequent alleged payment to the Sioux of "amounts that in hindsight appear to equal or even exceed the fair value of the property does not make the initial acquisition any the less a fifth amendment taking." (Pet. App. 28a.)

2. *The 900,000 acres*: Petitioner asserts that "the 1877 Act recited that 'in consideration' of the cession of the Black Hills, the United States undertook a number of commitments, including . . . the grant of 900,000 acres of grazing land . . . ." (Govt. Br. 49, 65, 73 at n.58.) A mere reading of the 1877 Act shows this statement to be untrue. Article 5 of the 1877 Act actually recites that, "[i]n consideration of the foregoing cession of territory and rights," the United

the 1877 Act); (e) whether the rations were issued to Indians and their families who lived upon lands suitable for cultivation, but did not labor (who also were not entitled to subsistence); (f) whether the rations were delivered at a time the Sioux were not in compliance with each and every obligation imposed by the 1877 Act; or (g) and most important, whether the expenditures for rations, as listed in the GAO reports, were limited to the items specified in Article 5 of the 1877 Act.

[56] The Government's $43 million figure is, of course, inaccurate on its face, since it contains $3,055,450.53 spent during fiscal years 1875 and 1876, which could not possibly be "consideration" under the 1877 Act. (A. 234; Govt. Br. 36, n.25.)

States agrees to provide certain benefits to respondents, but the addition of 900,000 acres to the Great Sioux Reservation is not among them. The addition of grazing land to the reservation was effected by redefining its boundaries under Article 1, which does not mention "consideration." The plain language of the statute thus dictates that the 900,000 acres to which petitioner refers may not be treated as part of the consideration for the Black Hills country and other Sioux interests acquired by the United States under the 1877 Act.[57] *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 194 (1978).[58]

Assuming, *arguendo,* that the value of the 900,000 acres of grazing land added to the Great Sioux Reservation in 1877 were "consideration," the issues in this litigation would remain unaffected.[59] The Court of Claims has established a rule that the Government

[57] Although not "consideration", the United States could have asserted the value of the 900,000 acres as a payment on the claim pursuant to section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a. The Government, however, waived that right before the Commission in 1976. (*See* pp. 27-28, *supra.*)

[58] Even if the language of the 1877 Act were ambiguous, this Court consistently has held that statutes enacted for the benefit of Indians are to be liberally construed in their favor. *Bryan* v. *Itasca County,* 426 U.S. 373, 381 (1976); *accord, Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 99 S.Ct. 2529, 2537 (1979) ("'statutes passed for the benefit of dependent . . . Indian tribes are to be liberally construed'"); *Squire* v. *Capoeman,* 351 U.S. 1, 6 (1956) ("Doubtful expressions are to be resolved in favor of [Indians]."); *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912) ("The construction, instead of being strict, is liberal").

[59] The Court of Claims pointed out, and petitioner here confirms, that the Government did not contend below "that the transfer of this additional land was a significant element of the consideration the United States gave for the Black Hills." (Pet. App. 13a at n.3; Govt. Br. 73 at n.58.)

is entitled to a credit for a land restoration "only to the extent of the purchase price paid by the United States." *Ponca Tribe of Indians of Okla.* v. *United States,* 183 Ct. Cl. 673, 689 (1968). The Indian Claims Commission has determined that the 900,000 acres had a fair market value of $.67 an acre, or $603,000, in 1868 when the Government acquired the land from the Sioux, but the United States actually paid only a tiny fraction of that value. *Sioux Tribe* v. *United States,* 38 Ind. Cl. Comm. 469, 500, 530 (1976) (*see* p. 7, n.5, *supra*). The value of the 900,000 acres thus is *de minimis.*[60]

3. *The burden of proof*: The Government repeatedly complains that the Court of Claims, rather than assuming that Congress deemed its undertaking to provide rations to be "a *fair* consideration" (Govt. Br. 63, emphasis in original; *see* p. 72, n.51, *supra*), in effect "placed the burden of justifying its action on Congress" (*id.* at 45) and "wrongly required of the Congress an affirmative declaration that the undertaking assumed in consideration of the cession of the Black Hills constituted a fair economic equivalent." (*Id.* at 49, 52, 63.) The court below adopted no such approach. The court examined the record objectively to determine what Congress did and what Congress knew, not whether Congress said ritual words or made "affirmative declarations" of a bona fide intent. (*See* pp. 30 and 56-58, *supra.*) The court's ultimate finding of fact that Congress did not make a good faith

[60] Whatever value the 900,000 acres might have also would be more than offset by the value of respondents' rights under Articles 11 and 16 of the 1868 Treaty, not included in the award of the court below, for which the Sioux rejected a Government offer of $500,000 in 1875. (*See* pp. 11 and 23 at n.19, *supra.*)

effort to give the Sioux full value for their property had to be expressed in negative language—*i.e.*, "[n]owhere in the report. . .", "lack of any discussion", "[t]here is no indication that. . .", etc. (Pet. App. 22a, 24a, 26a)—but such statements were based upon evidence of inaction, not any presumption against the United States.

Moreover, no basis exists for petitioner's contention that an Indian tribe must show a lack of a congressional "good faith effort" by "compelling evidence" (Govt. Br. 63) or "overwhelming evidence" (*id.* at 55), and, indeed, the Court of Claims properly could have placed the burden of proof upon the Government here. In other words, the Sioux have demonstrated, and petitioner does not deny, that the land and rights which the United States obtained had a fair market value in 1877 of $17, 553,484. The respondents' having met their burden of proof, logically, under the court's test, the burden would shift to the Government to show that Congress had made a good faith effort to pay that amount or its equivalent.[61]

E. Summary

To summarize, even if the good faith effort test were applicable in this case, the Court of Claims properly concluded that "[t]he terms upon which Congress

[61] Using trust doctrine as an analogy, as petitioner sometimes suggests (Govt. Br. 69-70), the principle is well-settled that the burden of proof is upon the trustee to show that he did not take advantage of his position, particularly where, as here, he has a conflicting interest. *Sheridan* v. *Perpetual Building Assoc.*, 299 F.2d 463, 465 (D.C. Cir. 1962) ("[A]ncient principles require [the trustee] to bear the burden of proving that he has been faithful to [the] trust").

acquired the Black Hills. . .did not reflect or show any considered judgment by Congress that it was paying a fair price." (Pet. App. 25a.) The absence of a good faith effort, of course, does not mean that "Congress was knowingly cheating the Sioux. . . ." (Govt. Br. 67.) The only question is what effort Congress made to pay for the land, not the presence or absence of praiseworthy motives. The concern of this case is with just compensation, not good and evil.

The Government's speculation that some members of Congress may have believed that the best interests of the Sioux would be served by the expropriation of the Black Hills, and by being encouraged to become farmers, is immaterial. What needs to be shown, and what respondents clearly have shown, is that Congress enacted legislation to acquire control over the Black Hills and open that gold-rich country to non-Indian exploitation, and that no identifiable congressional concern was expressed over payment of fair value for the property. Under the good faith effort test, therefore, the 1877 Act effected a taking of Sioux lands and rights in violation of the Fifth Amendment.

III. The United States Is Not Excused From Its Constitutional Obligation to Pay the Sioux Just Compensation for Taking Their Property Even if Congress in the 1877 Act Intended to Promote Their Welfare.

The Government here asks the Court to depart significantly from both (1) the rule established in *Shoshone Tribe* v. *United States, supra,* and other Fifth Amendment cases decided by this Court that Indian tribes are entitled to the same measure of just compensation as non-Indian property owners, and (2) the more strict "good faith effort" rule invoked by the

Court of Claims for testing Fifth Amendment violations. To defeat the Sioux, the Government argues for the first time in any court that the United States need not pay just compensation for the legislative taking of recognized Indian property "if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." (Govt. Br. 52.) The Government also argues that the legislation must be presumed to be in the interest of the tribe, that the presumption can yield only to "overwhelming evidence that Congress was not acting as a bona fide guardian" (*id.* at 55) and that any "rational basis" for the taking relieves the Government of the duty to pay just compensation (*id.* at 58).

This extreme position—that Indian tribes, alone among all private property owners, must satisfy special requirements to receive constitutional protection for "property within the meaning of the Fifth Amendment" (*see Shoshone Tribe,* 299 U.S. *supra* at 497)—is particularly ironic because it is based on the Government's trust responsibility to the Indians. The argument has no rational basis, is inconsistent with the controlling decisions of the Court, and should be rejected.

A. The Government's fiduciary duty to Indian tribes does not justify giving treaty-protected tribal property less protection under the Fifth Amendment than other property.

Since the decisions of Chief Justice Marshall in *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 16-17 (1831) and *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), the settled jurisprudence of this Court has been that the United States "has charged itself with moral obligations of the highest responsibility and

trust" in Indian affairs. *Seminole Nation* v. *United States,* 316 U.S. 286, 297 (1942). As the Court observed in *Heckman* v. *United States,* 224 U.S. 413 (1912) at 437:

> Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. . . .

Thus, the Court often has held the United States to "the most exacting fiduciary standards" and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *Seminole Nation* v. *United States,* 316 U.S. *supra* at 296; *United States* v. *Payne,* 264 U.S. 446, 448 (1924). Most recently, the Court held the Government to an "overriding duty to deal fairly with Indians" in *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974).

Petitioner attempts to avoid the impact of this well-established duty by relegating its application to cases filed under special jurisdictional acts. (Govt. Br. 59-61.) The argument is specious. Neither *Cherokee Nation, Worcester, Heckman, Morton* nor *Payne* was brought under such an act. This Court never has intimated that the Nation's responsibility is so limited. Moreover, as the Court stated in *Shoshone Tribe,* 299 U.S. *supra* at 492-93, rejecting the Government's attempt to read substantive conclusions into a jurisdictional act, "the jurisdictional act * * * merely provides a forum for the adjudication of the claim according to applicable legal principles." *See also United States* v. *Mille Lac Band of Chippewas,* 229 U.S. 498, 500 (1913).

In a further effort to escape its obligation to pay just compensation under the Fifth Amendment, the Gov-

ernment seeks to substitute its fiduciary duty for its constitutional duty, arguing that an award for breach of trust by the United States does not carry interest. (Govt. Br. 61-63.) As previously noted (p. 43, n.32, *supra*), this Court considered and rejected that argument 45 years ago in *United States* v. *Creek Nation, supra.* In *Creek Nation*, the Court specifically held that the power of the United States to control tribal property was "subject to limitations inhering in . . . guardianship *and* pertinent constitutional restrictions" such as the just compensation clause, and awarded interest for a taking. (295 U.S. *supra* at 110; emphasis supplied.) In short, the Government was subject to two proscriptions in the disposition of Sioux lands and rights—its fiduciary duty and the Constitution.

Petitioner would turn the Indian trust doctrine on its head by permitting Congress to acquire tribal property, subject to special federal protection, for a lesser consideration than comparable non-Indian property. Special powers imply special responsibility, not lessened responsibility. At the very least, *Creek Nation* stands for the principle that the United States, in carrying out its fiduciary duty to Indians, must observe no lower standard in dealing with tribal trust property than is invoked with respect to any other private property. Surely, the "limitations inhering in . . . guardianship and pertinent constitutional restrictions" not only prohibit imposing the extraordinary disabilities on tribal reservation lands and rights here urged by the Government, but also require the payment of just compensation to Indians on the same basis as non-Indians. Where Congress pays the Indians less than just compensation for their property, the Government may not be said to be serving in its fiduciary capacity, "for that 'would not be an exercise of guardianship, but an act of confiscation.'" *Shoshone Tribe* v. *United States,* 299 U.S. *supra* at 498.

A similar analysis is applicable to petitioner's argument that the Government was legally justified in expropriating the Black Hills and other Sioux rights for less than fair value because the United States had to provide for the needs and welfare of the Sioux. (Govt. Br. 67-74.) A requirement that just compensation be paid for takings of tribal property does not compromise the Government's power as a trustee by forcing it to become "a very conservative land manager" or by precluding it from reducing the "net worth" of tribe to provide for its welfare. (Govt. Br. 71.) A trustee naturally should be able to sell real property held in trust for such purposes as, for example, paying for the education of the trust beneficiary or meeting other essential needs. For the Government to argue from that premise that the trustee need not obtain full value for his own taking is absurd. A trustee has a duty to sell the property of the beneficiary at the highest market price, not a right to obtain it for less. Assuming, as petitioner asserts, that the Sioux faced "dismal" and "severe economic circumstances" in 1877,[62] their "guardian" made those circumstances far worse by acquiring tribal capital for less than full value. The United States may not claim the attributes of a trustee with respect to the 1877 Act because it was not then acting as a trustee.

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[62] The existence of a claimed crisis, of course, does not repeal the Fifth Amendment, or make a Fifth Amendment taking any less a taking. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

B. Because the constitutional power of Congress to enact the 1877 Act is not questioned in this case, the "rational basis" standard of *Morton* v. *Mancari* is irrelevant to the issues before the Court.

Petitioner asserts that "[t]he basic error of the Court of Claims, in our view, was in reversing the usual presumption and requiring the United States to assume the burden of demonstrating that the 1877 Act does not overstep the bounds of congressional power over Indian affairs." (Govt. Br. 52.) That issue is not now and never was in the case. Respondents concede the validity of the 1877 Act—as we must, given *Lone Wolf, The Cherokee Tobacco,* 78 U.S. (11 Wall.) 616, 621 (1871), and like cases confirming congressional "plenary power"—and further acknowledge the underlying constitutional authority of Congress to manage and dispose of Indian property for their best interests. The critical question in this case is whether the United States, having exercised its undoubted power to acquire the Black Hills country and other Sioux rights in land, is required to pay just compensation under the Fifth Amendment for the property taken. Contrary to petitioner's thesis, application of the just compensation clause in no way diminishes congressional power validly exercised under any other provision of the Constitution.[63]

The real issue here presented makes irrelevant whether the Government's disposition of the Black Hills was "tied rationally to the fulfillment of Con-

[63] Congress can, and frequently does, authorize the taking of property belonging to non-Indians under perfectly valid statutes, but the validity of such statutes under the Constitution does not serve to deprive the non-Indian owners of their right to just compensation.

gress' unique obligation toward the Indians." *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974); *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73, 85 (1977). The "tied rationally" standard is employed to test whether a statute affecting Indians is within the constitutional power of Congress. The standard is made appropriate by the Court's changed approach to Indian political questions since the days of *Lone Wolf.* (*See* pp. 53-54, *supra.*)

Thus, in *Morton* v. *Mancari, supra,* the Court held that Congress might constitutionally confer a preference upon Indians to employment in the Bureau of Indian Affairs, reasoning that the preference statute was "rationally designed to further Indian self-government," an obviously permissible congressional Indian policy. 417 U.S. *supra* at 555. Similarly, in *Delaware Tribal Business Comm.* v. *Weeks, supra,* the Court upheld the constitutionality of a statute distributing a tribal judgment fund which excluded individuals who historically had been members of the tribe but had severed their tribal relations. 430 U.S. *supra* at 85-89. By contrast, since the constitutionality of the 1877 Act is not questioned in this case, only a purely judicial determination of just compensation for a legislative taking remains, and that is an issue to which the rational basis test has no application.

C. The Government's position would deny Indian tribes equal protection of the laws and leave present day tribes helpless against arbitrary congressional action by removing the constitutional requirement that recognized title lands can be taken only upon payment of just compensation.

The Government's proposed rule would deny equal protection of the law to Indian tribes seeking just

compensation for takings of their property.[64] To be sure, the Court has sustained legislation which classifies Indians differently in some respects from non-Indians, *e.g., Morton* v. *Mancari, supra,* even where the classification may operate to the detriment of an Indian in a particular circumstance. Thus, in *United States* v. *Antelope,* 430 U.S. 641 (1977), the Court upheld conviction of an Indian for first-degree murder of a non-Indian on an Indian reservation, by application of the felony-murder rule, under the Major Crimes Act, 18 U.S.C. 1151. Had the defendant been a non-Indian, the State of Idaho would have possessed jurisdiction to try and punish the offense, and the defendant could not have been convicted of first-degree murder because the State did not follow the felony-murder rule. Chief Justice Burger, speaking for a unanimous Court, rejected the claim that equal protection had been denied, emphasizing "that Indians indicted under the Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction * * *. Respondents were, therefore, subjected *to the same body of law as any other individual, Indian or non-Indian,* charged with first degree murden in a federal enclave." (430 U.S. at 647-48;[65] emphasis supplied.)

In the present case, on the other hand, if the Government's rule were adopted, the "same body of law" would not apply to both Indian tribes and non-Indians

[64] Indian tribes are unquestionably covered by "the equal protection component of the Fifth Amendment." *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 74, 84 (1977).

[65] The Court continued that "[t]he Federal Government treated respondents in the same manner as all other persons within federal jurisdiction." (*Id.* at 649.)

claiming just compensation under the Fifth Amendment for a federal taking of their property. The federal "body of law" concerning just compensation would not be "evenhanded," and equal protection would be violated. (*Id.* at 649.) For contrary to the express purposes of the 1946 Indian Claims Commission Act, the Government's proposed standard would revive an unjustified "discrimination" between Indian tribes and all other property owners in suits against the United States.[66]

According to petitioner's argument, every eminent domain plaintiff, except an Indian tribe, is entitled to

[66] Until the Indian Claims Commission Act of 1946, Indian tribes generally could not sue the United States in the Court of Claims. (*See* p. 19, *supra.*) The 1946 Act's "primary objective" was to remove this "lingering discrimination." H. REP. No. 1466, 79th Cong., 1st Sess. (1945) p. 2. As the House Report states:

> The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out its part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal district courts, and secure a full, free, and fair hearing on his claims against the Government. * * * The only American citizen today who is denied such recourse to the courts is the Indian. By virtue of a statute adopted on March 3, 1863, at a time when a good many Indian tribes were engaged in hostilities against the Federal Government, all claims against the United States growing out of Indian treaties were barred from the jurisdiction of the Court of Claims, and from that day to this no Indians have been able to bring their disputes with the Federal Government before the Court of Claims without a special act of Congress. . . . (Footnotes omitted.)

(*Ibid.*) This central theme was repeated in numerous statements by the bill's sponsors and supporters on the floor of the House. *E.g.,* 92 CONG REC. 5312 (remarks of then-Congressman Henry Jackson), *id.* at 5318 (Congressman Stigler), 5319 (Congressman Rizley) (Congressman Case), 5320 (Congressman Stefan).

be paid the value of his property on the date of taking plus interest as a measure of just compensation. Indian tribes would receive neither, so long as the United States promised any beneficial consideration when the land was acquired. In that event, tribal claimants would be denied interest as a matter of course. In addition, since under the Government's view such disposition of Indian lands would not violate the just compensation clause, a tribal claim for fair market value would not arise under the Constitution so as to be within the jurisdiction of the Court of Claims pursuant to 28 U.S.C. § 1505. Accordingly, an Indian tribe paid something, but substantially less than fair market value, for lands taken by Congress today surely would be denied interest for delay in payment and probably would be denied any compensation above whatever Congress chooses to provide.[67] Contrary to established principles of law since *Monongahela Navigation Co.* v. *United States, supra,* Congress by statute could, in Indian cases only, "assume the right to determine what shall be the measure of compensation." 148 U.S. *supra* at 327.

The constitutionally-protected property rights of all modern day American Indian tribes thus are put at risk by the position of the Government in this case. To be sure, the facts here presented involve a taking over a century old in circumstances unlikely to recur today. But if the Court sustains the Government here, the result will be that Congress can take Indian lands and other property rights so long as it provides *any*

[67] The Court of Claims does not have jurisdiction over statutory breach of trust, unconscionable consideration or fair and honorable dealings claims. *Menominee Tribe of Indians* v. *United States,* —— Ct. Cl. ——, 607 F.2d 1335 (1979), petition for a writ of certiorari filed January 15, 1980 (No. 79-1103).

compensation or benefit to the tribe which Congress might consider reasonable—no matter how arbitrarily determined or how many millions of dollars short of fair value. Indian recognized title then would become little more than a tenancy by sufferance terminable at the pleasure of Congress—a result expressly rejected by the Court on repeated occasions.

CONCLUSION

The judgment in this case is large, but the precedents in eminent domain cases upon which the Sioux award rests are solid. Faced with the rule of *stare decisis,* the Government here asks this Court so to construe the Constitution as to exclude one class of property owners, Indian tribes, from full protection under the taking clause of the Fifth Amendment. In effect, the United States would encrust an exception upon the plain words of that amendment, making the language read, "nor shall private property be taken for public use, without just compensation, *unless the property belongs to an Indian tribe.*" To achieve this result, the Government advances the theory, freshly invented for this litigation, that, if Congress authorizes some payment to an Indian tribe, the constitutional requirement of just compensation is avoided, even though the payment made bears no relationship to the value of the property taken. This Court considered and rejected over 80 years ago a Government argument that Congress has the power to fix the amount of just compensation for lands taken by the United States. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 325 (1893).

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

ARTHUR LAZARUS, JR., ESQUIRE
Fried, Frank, Harris, Shriver
& Kampelman
600 New Hampshire Avenue, N.W.
Suite 1000
Washington, D.C. 20037
(202) 342-3624

Of Counsel:

MARVIN J. SONOSKY, ESQUIRE
REID P. CHAMBERS, ESQUIRE
HARRY R. SACHSE, ESQUIRE
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

WILLIAM HOWARD PAYNE, ESQUIRE
1086 National Press Building
14th & F Streets, N.W.
Washington, D.C. 20045

BETH LABSON-FREEMAN, ESQUIRE
Fried, Frank, Harris, Shriver
& Kampelman
600 New Hampshire Avenue, N.W.
Washington, D.C 20037